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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 266.

W. J. HAWKINS, PLAINTIFF IN ERROR,

vs.

JOHN GLENN, TRUSTEE, &c.

BRIEF FOR THE PLAINTIFF IN ERROR.

PHILLIPS, LAMAR & ZACHRY,
For Hawkins.

JUDD & DETWEILER, PRINTERS.

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BRIEF FOR THE PLAINTIFF IN ERROR.

Hawkins was defendant below, the cause of action being *a call* (folios 11, 27, 28) made in a Virginia court of equity upon an unpaid subscription for stock in the National Express and Transportation Company (originally the National Express Company), an insolvent Virginia corporation that had made an assignment for its creditors (see folio 42), its assets being mainly such unpaid subscriptions.

The subscription in question was made at Richmond, Va., November 1, 1865, payable in amounts as *called* for (folio 28); the company was organized in January, 1866 (folio 30); the assignment was executed September 20, 1866 (folio 42), and, as was contemplated by the assignment (folio 42), the company stopped business November 1, 1866 (folio 28).

Hawkins, always a citizen of North Carolina (folio 30), was one of the first board of directors of the company (folio 28). The record does not show when he ceased to be such, but it was before the time when the company stopped business (folios 39, 40).

The company was intended to do a large express business. Some four millions of dollars were subscribed to its stock, in New York, Maryland, Virginia, and other States (folio 110). At the stoppage 20 per cent. of this had been *called* and $600,000 *paid* (folio 35).

[It is matter of history that during the first year after the Confederate government had come to an end great expectations were formed and acted upon in the Southern States, that a new and prosperous order of things was immediately at hand. A few months afterwards, however, it appeared that the process of reconstruction, like the contrary process which preceded this, would probably require some years for its maturity. Confidence in current business projects, otherwise reasonable, thereupon was abandoned, and the whole section was strewn with wrecks of these. It may be of use to recall this well-known state of things the better to understand how it was that the company in question, whose projectors in December, 1865 (Record, folio 222), had been well aware that *five*, and perhaps *ten*, millions of dollars would be needed for its establishment, was abandoned without protest within a year after its organization, when, counting its debts, less than one million had been expended.]

The trustees under the assignment made slow progress in settling the business during more than twelve years (folios 36, 46). They brought suits, indeed, in several States, but without success. Nor did the creditors take any step to prompt or aid these until the 28th of November, 1871, when a subpœna in equity was issued against the president and directors, and also the trustees of the company, at the instance of one creditor suing for all. The original bill was filed (folio 34) upon the 4th day of December, 1871, the re-

turn day of the subpœna, and it *prayed* for process against the company as well; but no subpœna issued against the latter until August 5, 1879 (folio 63), and that for the purpose of a supplemental bill.

The original bill (folio 34) contained allegations usual in such cases, viz., as to the organization of the company, its proceedings, and assignment, the subsequent proceedings of the trustees; that the plaintiff was advised that the unpaid subscriptions constituted a trust fund for creditors, but that these had not been conveyed by the assignment (folio 37), and thereupon the prayer was for a receiver; an account; that a *call* might be made by the directors upon the unpaid subscriptions (folio 40), &c.

By the return day of the original subpœna it had been served only upon two of the directors (folio 33), and upon their non-appearance judgment was taken against them *pro confesso* (folio 45).

After this nothing more was done in the cause for more than seven years (folio 45).

In August, 1879, an amended and supplemental bill was filed (folio 45), and a subpœna then first taken out against the National Express, &c., Company and its cashier in addition to those named in the original subpœna, and thereunder, or by publication, process was served. This bill restated the original case, complained that since the filing of the former bill the trustees and the company had done nothing towards satisfaction of the creditors, and that the trustees had become non-residents; and thereupon it added to the prayers in the former bill one for removal of the trustees and a substitution of others, &c.

This bill also was taken *pro confesso*, except that two short answers were put in (folios 65 and 69), and also that at the hearing the trustees filed answers, in which they echoed the bill, and tendered their resignations, (folios 207, 215, 216).

Afterwards an account of debts was taken to the amount of $509,392.41 (folio 76), and thereupon by decree, December

14, 1880, a call of 30 per cent. was made upon the whole subscription (folio 206), and Glenn was appointed as substitute for the trustees named in the assignment, who, with words of approbation and regret from the court (folios 188, 189, and 230), were removed.

In pursuance of the *call* by the court this suit was brought by Glenn upon the 5th of November, 1883 (folio 4), the complaint (N. C. Code of Civil Procedure) being filed on the 27th of that month.

It alleged (folio 8, &c.) that on the 1st of November, 1865, Hawkins had subscribed for 250 shares, of $100 each, in the National Express and Transportation Company, payable as called for; and then, after mentioning the assignment and decree in equity as above, &c., prayed judgment for $7,500 and interest.

The answer of Hawkins, amongst other things, set forth specially (folio 19), as regards 150 shares of those sued upon, that at the time of subscribing he had expressly proposed to the agents who superintended the subscription to *the National Express Company* (which afterwards became the National Express and Transportation Company) to take them upon behalf of three principals of his, whom he then named (*Heck, Battle, and Williamson*), and who had authorized him so to do, and who, besides, were of ample means, "*and that, at the suggestion of said agents and for their convenience, such shares, as well as one hundred additional shares which this defendant proposed to take for himself, were expressed in the book in which such subscription was entered or taken by this defendant, it being understood, however, as above, that the* 150 *shares taken as above for Heck, Battle, and Williamson were, in fact, their property and not that of this defendant,*" and that when the transfer of such subscriptions was made to the National Express and Transportation Company that matter was again represented to the officers of the latter in charge of the transaction, and that these certificates (five) were subsequently transmitted to him in North Carolina. "*He at once trans-*

ferred [these] to the persons whose names had been given to the agents of the two companies as above, this defendant having, as was known to said companies as above, never intended to own or to be liable on behalf of said 150 shares, and such companies having all the while been informed of and assenting, as above set forth, to such intention."

This answer also pleaded (folio 17) that the plaintiff's cause of action did not accrue within three years, &c.

At the trial the plaintiff put in evidence (folio 27) a transcript of the equity case at Richmond (folios 34–233), and showed the organization of the company—the assignment—that Hawkins had been a promoter of the scheme and a subscriber, and was an original director, &c.

The only evidence for the defendant was given by himself (folio 30), substantially as follows: In the fall of 1865, at the instance of three named persons, who, like himself, were citizens of North Carolina, he went to Richmond and proposed to take fifty shares in the company for each of them, and also one hundred shares for himself, and that for some personal reason of convenience suggested by the agent for subscription, his name alone was placed upon the book as subscriber for all, the initial letters of the names of his principals being endorsed thereon as a memorandum; and that in January, 1866, when the company was organized, he, being then a director, informed the board of the terms of his subscription, and that no objection was made; that thereupon he instructed the officer who was to make out the certificates to issue three certificates for the 150 shares, in the names of his principals; but that upon returning to North Carolina those three certificates, as well as the others, were made out in his own name, and thereupon were by him immediately transferred to said principals.

Upon this testimony the court (folio 31) instructed the jury that "*if they believed the evidence they must find for the plaintiff.*" The defendant excepted.

Verdict and judgment accordingly for $9,508.75, of which $7,500 is principal, &c.

The above instruction by the court involves, as is now submitted, the following errors, beginning with those of least pecuniary importance:

1. That interest upon the amount *called* ($7,500) accrued from the date of the decree and not from the time (nearly three years later) at which it was actually demanded, viz., by the filing of the complaint.

2. That the defendant was responsible for the 150 shares taken by him as agent as above; and

3. That the cause of action accrued within three years.

From the above statement it will be seen that the present is an action brought by one who stands *in the shoes of the company*, and not by one who *represents creditors*, except in his character as trustee for certain *cestui que trusts*, who are described (folio 44, "*ninthly*") as "creditors." The plaintiff is a substitute for trustees created by the voluntary deed of the company, and consequently is bound in general by whatever would have bound the latter had it been plaintiff. Wisner *v.* Brown, 122 U. S., 214; Grimsley *v.* Hooker, 3 Jones' Eq. (N. C.), 4; Heinrichs *v.* Woods, 7 Mo. App., 236.

There is, in some important respects, therefore, a material difference betwixt the present case and cases in which the plaintiff is a mere *creditor*, or an *assignee in bankruptcy*, or a *receiver* appointed by a court; such as Ogilvie *v.* Knox Ins. Co., 22 How., 380; Upton *v.* Trebilcock, 91 U. S., 45; Hatch *v.* Dana, 101 U. S., 205; Scovill *v.* Thayer, 105 U. S., 143; Taylor *v.* Bowker, 111 U. S., 110; Marsh *v.* Burroughs, 1 Woods, C. C., 463.

This will be referred to again hereafter.

To discuss the errors above assigned in their order:

1. *Interest upon the call accrued only from actual demand upon the defendant, and not from the date of the decree—i. e., it accrued from November 28th, 1883, and not from December 14th, 1880.*

It will be borne in mind that the decree for a call was made in a suit begun against the company nearly thirteen years after it had stopped business, the defendant also not having been made a party thereto, either directly or in the persons of other stockholders sued on behalf of all.

In such case it is submitted that until actually notified he is not chargeable with neglect for non-compliance with orders made therein.

Whilst a company is *a going concern*, it is admitted that a stockholder has implied notice of calls made by it; for he is, from day to day, directly or indirectly, art and part in its transactions. If the call be made by voluntary action of the company, this consequence is plain; and also if it be made in the course of a suit against the company, *commenced before it had stopped business*, the principle is the same. In that case the stockholder would be chargeable with notice of the bringing of the suit, and consequently of whatever passes in its course, even although the company, *pendente lite*, may have stopped business; none the less, of course, if the very object of such suit, as in proceedings in bankruptcy, has been to stop that business.

The words of this COURT, in Sanger *v.* Upton, 91 U. S., 56, to the effect that stockholders are *before the court* in all proceedings therein touching the corporation, are to be taken in connection with the contention to which they were there opposed, viz., the contention that a stockholder *is not bound* by a call made in a cause to which he is not a party. That he is so bound is not denied here. He may be *bound* by it,

but he is not *chargeable with laches* for not obeying it until notified of its requirements. He may be suable thereupon in like manner as a party to a note payable on demand is suable upon that—*i. e.*, without an actual previous demand; yet, in the same way, he is not liable for interest thereupon except from the time of a *demand*, made either *previous* to the bringing of the action, or *by* it. Byles on Bills, p. 241; Hunt *v.* Nevers, 15 Pick., at p. 505.

In this connection it will be recollected that, as has been decided in California in a suit brought by the present plaintiff against another subscriber, a call made by a court is not *a decree for the money* involved in such call. Upon a plea of the statute of limitations, it was held in that case that the clause of the statute applicable was that which provided for suits—not upon *decrees* rendered in other States but—upon the sort of contract which had been created by the subscription; inasmuch as in the nature of the case the call only authorized a suit *upon the subscription*. Glenn *v.* Saxton, 68 Cal., 353.

In conclusion, it is submitted that where stockholders, in an open and legal manner and in good faith, have abdicated control of their company and turned its property over to third persons for the benefit of its creditors, they are not thereby chargeable with *implied* notice of proceedings in court taken against the company for the purpose of bringing its powers to bear upon such stockholders; the *precise* features of the present proposition being that where control was abdicated in November, 1866, and proceedings were begun in Virginia in August, 1879, a stockholder who then and always resided in North Carolina could not be charged thereby alone with notice of a decree under such proceedings rendered in December, 1880.

2. *The defendant is not responsible for the subscription to the* 150 *shares taken by him for solvent and named principals, and*

for which it was, at the time of subscription, agreed between the parties that he should not be liable.

The contention thus raised does not affect any policy that may exist as regards the effect of *a transfer* (see Va. Stat.: Append.) of shares once actually owned. For upon the case made by the testimony of Hawkins he never owned the 150 shares. It is true that the shares here were in the end actually transferred, but that transfer plays no part here except as indicating the *bona fides* of Hawkins. He had been authorized by others to take the 150 shares in good faith. He proposed to the company so to take them *formally* as well as *really*. The company agreed that the real transaction was to be as suggested, whilst for some reason of convenience the form should be that of a subscription by Hawkins for himself. The certificates thereupon having been transmitted to him at a distance, he at once transferred them to his principals. In other words, the *res gestæ* shows that his action was consistent with his representations. The transfer has no other bearing upon the case.

Upon this state of facts it is submitted that as between the company and Hawkins the subscription for the 150 shares was one upon which he could at no time have been held liable. See argument by the court in Scovill *v.* Thayer, 105 U. S., at p. 153 (bottom), &c.

It is true that if the present suit had been one brought by a *creditor*, either directly or represented by a receiver, a *creditor*—that is, *as such*—asking aid for a defective process at law, *ex. gr.*, after judgment and return of *nulla bona*, Hawkins might have been embarrassed by the form in which, with his consent, the transaction had been clothed. But the present suit is by a substitute for trustees who had been created by the voluntary action of the company; a substitute, therefore, who is bound by all that the company itself would have been bound if it had been plaintiff (Wisner *v.* Brown, 122 U. S., 214). The "creditor who brought the equity suit in Virginia was essentially *a mere cestui que trust.* under the as-

signment of September, 1866, which (folio 44) had created its then "creditors" *certui que trusts* of the property therein assigned. In the original bill, which surmised that *the unpaid subscriptions had not been conveyed* by the assignment, the complainant seems, indeed, to have been at some loss to define his relation to the case, but in the supplemental bill he states that relation more assuredly; and there can be no doubt as to the view taken by the Virginia court, viz., that the complainant was seeking and was entitled to an enforcement of a trust to which he was a party.

It may be contended, however, by the plaintiff that the present is a case under the rule that if an agent bind himself upon the face of a written contract he will not be allowed to discharge himself therefrom by evidence that he did so merely as agent. (2 Sm. Lead. Cases, 8th ed., 415.)

It is submitted that such rule does not apply where, as in the present case, a court of law is authorized to admit "*equitable pleas.*"

The pleading in the present case, on both sides, is under the North Carolina Code of Civil Procedure, as allowed by section 914, U. S. Revised Statutes. Under that code the plaintiff has brought suit *in his own name* upon an equitable title to a chose in action, as being "the real party in interest," sec. 177 (*Code* 1883, vol. 1, page 66). In the same way the defendant has answered under the provision of the same code allowing defendants to set forth any "equitable" defense that they may have. Sec. 245 (*ibid*, page 93).

As is well known, "equitable pleas" have been allowed in the English courts of common law at least since 1854. In Wake *v.* Harrop, 6 Hurlst. & Norm., 768, and (in error) 1 Hurlst. & Colt., 202, the defendants had executed a charter-party in writing, that if a certain ship should proceed to a certain port in Sicily they would load her with sulphur, &c., and signed the same "For A. Davidson & Co., Messina, T. W. & J. C. Harrop & Co., agents." The charter-party,

however, upon its face bound the defendants as principals. Thereupon they pleaded that it was agreed betwixt themselves and the testator of the plaintiff that they were not to be liable upon the contract, but that Davidson & Co. alone were to be so.

To this plea the plaintiff demurred.

Wake *v.* Harrop therefore agrees with the case before the court in being one in which, upon the face of the writing, the defendants were liable as principals, although it had been agreed between the parties that they should not be, and although, besides, it was understood that the writing did not affect that agreement. In that case, too, the contention of the defendant was admitted by demurrer, as it is here by the direction to the jury.

In the two courts nine judges gave their opinions upon the point. They were unanimous that, however it might be at law (upon which point the large majority were of opinion that the plea would have been bad), as an equitable plea it was valid. In the court of exchequer, Pollock, C. B., said:

"We are all of opinion that the plea is good, either at law or in equity. I think that it is good in equity. It professes to state that at the time of the execution of the agreement the defendants said, '*We do not mean to make ourselves liable*,' and that was assented to by the testator. I do not doubt but that if this were made out satisfactorily a court of equity would hold the defendants entitled to a perpetual injunction, on the ground that the testator expressly renounced his rights against them. Under these circumstances the plaintiff had no right to sue the defendants, and never ought to have sued them."

In the exchequer chambers, Byles, J., said:

"I feel bound to say that the plea affords no defense at at law. Parol evidence may be given to charge an unauthorized agent as principal, but parol evidence cannot be admitted to discharge an agent who signs an instrument so as to make himself personally liable. Therefore the defendants must rely upon their equitable plea, as showing what

was the intention of the parties at the time the agreement was entered into.

Mews' Digest (3d, 1313; 5th, 1345, and 6th, 83, 1323) cites the above case as authority for the point in question; and as it is the only case thereupon cited in that work, it may be taken to be satisfactory to the profession. See also 2 Smith Lead. Cas. (8th ed.), 416.

It is therefore submitted that Hawkins was entitled to an *undirected* finding by the jury as to his liability for the 150 shares.

3. *The cause of action did not accrue within three years.*

To recapitulate the facts in the record important in this connection:

The subscription was made November 1, 1865; the company stopped business November 1, 1866; the original subpœna in the equity suit was issued *against the directors and the trustees* November 28th, 1871; *the company was made a party to that suit* first, by the subpœna issued upon the supplemental bill, August 5, 1879; the call was made December 14, 1880; and this action was brought November 5, 1883.

Inasmuch as there was cause of action for a call in the present case immediately upon the stoppage of business, and inasmuch, farther, as such call was merely an incidental step in prosecuting the present suit, it follows that the cause of action in the latter accrued three years (and more) before it was brought, and therefore, referring to the above dates, that it is *barred*, under the North Carolina statute of limitations, which requires action upon contracts like that of the subscription in this case to be brought *within three years* after the cause of action accrued. Taking the Virginia suit in equity to be the first step in the *lis mota* for compelling Hawkins to pay his subscription, that *lis* was instituted nearly thirteen years after the cause of action accrued.

It makes little difference to this contention whether that first step was taken in 1871, when an abortive subpœna was issued, or in 1879, when for the first time the name of the company was inserted in process. The former alternative shows a delay of *five* years, which is more than enough under the North Carolina statute. But, as the company was an "indispensable party" to the bill [for an account—such account being a necessary preliminary to the call] (Williams *v.* Bankhead, 22 Wall., at p. 571) the suit cannot be regarded as begun for any purpose of the present action until August 5, 1879. As in Richmond *v.* Irons, 121 U. S., 27, 51 (bottom), the time was counted up to the amended bill (October, 1876), although the original bill was filed in February, 1875 (Wood, Limit., sec. 294). It is true that the company was included amongst those against whom the bill prayed for process (folio 41), *but it was excluded from the subpœna* (folio 33). This exclusion, of course, prevented the company from becoming a party to the suit until some other subpœna should rectify the omission. See 1 Dan. Ch. Pr. (5th ed.), 287, 390, *nn.*; Angell Limit., sec. 330; Virginia Code, 1860, p. 706, parag. 5: "The process *to commence a suit* shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action."

The delay of the *trustees* is complained of by the creditors in the bill, but that delay, so far as debtors to the trust fund are concerned, is delay by the *cestui que trusts* (those very creditors and complainants) as well (Clayton *vs.* Cogle, 97 N. C., 300; Wood, Limit., sec. 208), unless in cases where the trustees and debtors collude, which is not pretended here. Besides, there is, as just observed, the *direct* and unmistakable delay of the creditors themselves in filing the bill—*i. e.*, in taking the only step that could lead to their own satisfaction. The authorities of the corporation are indeed the only persons shown by the record as exhibiting diligence in taking steps to satisfy the creditors. For they created a trust

at once; thus placing their affairs, as soon as their enterprise became of doubtful issue, in the hands of the law, and of their creditors; and subsequently they interposed no obstruction to these proceedings, it appearing on the record that within about sixteen months after the equity suit was actively begun (folio 45) an account of a large and widely extended indebtedness had been taken (folio 75), and a decree entered accordingly (folio 188).

However, whether the action for a call were brought after *five* or after *twelve* years from the time at which the right to bring it accrued, the defense here is equally valid. For as soon as the assignment had been made the trustees, and likewise the creditors, were under such relation to Hawkins and others—subscribers who had not paid—that they were under obligation to bring at any early day whatever action was necessary in order to enforce *satisfaction* of what was due to them. If a direct action for such satisfaction was impracticable without a preliminary action, having for its object to fulfill a *condition* necessarily *precedent* to the second action; then, where *cause of* this previous *action accrued*, *cause* as well of the action in promotion of which it was necessary also accrued under the "obligation" which by the statute of limitations is incident to all actions for claims of the class of trust whose satisfaction is in view. In other words, to apply these principles to the present case: If after November, 1866, action could not be brought against Hawkins upon his unpaid subscription without a previous call, and if such call could not be made except in the course of an action therefor, trustees or creditors could not defer action for the call without incurring the same risk under the statute of limitations, as regards the subsequent action upon the subscription, that they would have incurred if the action [supposing no call necessary] had been directly upon the subscription. Whilst, if an action *for the call* had been brought in good time, and a subsequent action, *upon such call*, had also been brought in good time after that call, it

would have made no difference that, owing to *bona fide* and reasonable delays in prosecuting the suit, ~~in the case, &c.,~~ the second suit were brought (say) *ten* years after the original cause of action had accrued. If the second action is subject to no special bar because of delay therein after call made, it is so much an incident to the first suit—part of it—that no time whatever can be reckoned against it except that which elapsed between the accrual of the original cause of action (*i. e.*, the accrual of the right to call), and the institution of suit upon such cause.

It is submitted that this theory accords not only with the reason and policy, but as well with the text of the statute of limitations.

To consider the circumstances of the present case more closely:

1. It is essentially unlike the case of a call made by the authorities of a corporation still doing business.

For in that case the subscriber has *contracted* that such authorities might call as and when in their judgment the the affairs of the company might require it; and the state of things contemplated at the time of subscription is still going on. Therefore in that case it may very well be that, although no call had been made upon unpaid subscriptions within ten years or more, the statute of limitations had no application. *Modus et conventio vincunt legem.*

The case may be the same where a promise has been made to pay money so many days after demand and there is no context showing that such demand was to be made within a limited time; for there, if the holder makes no demand [*i. e.*, of course, *call*] for ten years or more, he is authorized *by the contract* so to delay, and the statute is inapplicable for the reason just stated.

2. The period of time in the present case whose lapse is supposed to have given effect to the statute of limitations

was a period during the whole of which the provision in the subscription (as affected by the Virginia statute, see Record, folio 228) which submits the subscriber to the discretion of "the president and directors" as to the time at which calls might be made, had become null, and the latter had, in respect of calls, become subject to the general principles of courts of justice. It is not because a debtor *has contracted* to be subject to the judgment of a court, whether for a call or otherwise, that such judgment is given. Judicial action, in that case only, *supervenes* upon the state of things which the contract had created, in the same way that it does upon like states created by torts.

In the case, Welsh Flannel and Tweed Co., L. R., 20 Eq., 360, the company was being wound up under statutory provisions, and the "liquidators" had made a call upon unpaid subscriptions. The articles of association had provided that the directors could make calls of only £2 a share, and that if unpaid these would bear £10 per cent. interest. The liquidators made a call of £3, and a question arose whether this carried the £10 per cent. interest. Malins, V. C., said, "I think that the articles of association do not apply to calls made by the liquidators," and thereupon ordered that "the usual interest of £5 per cent. [3 and 4, W. 4, c. 42] should be allowed."

This case illustrates the position that the administration of calls by courts of equity proceeds upon the principles of those courts, and not upon *contract;* and consequently that contract cannot be appealed to *vincere legem* as to promptness in bringing suit imposed upon suitors by those principles in general, as, for example, it might be appealed to in cases of promises to pay on demand, and certainly in those of promises to answer calls by a corporation still living.

The principle in the above case is indeed no other than that universally acted upon in equity in holding that the court is not bound by a stipulation in subscription making it a matter of discretion with directors to call. All that in

the view of equity survives of the terms of the original subscription is the promise to pay; and thereupon the administration: by taking accounts, and collecting on behalf of numerous creditors, out of a fund represented by debts owing by numerous debtors and which is more than sufficient to satisfy such creditors—so much as is necessary for its purposes:—*all this*, is matter of ordinary dealing in equity. It may be truly said that the device of calls, &c., by the corporation whilst in life, is borrowed from equitable methods, rather than that the proceeding in court after the stoppage of business is in point of method borrowed from the details of the constitution of the company.

It may be noticed here that no exception to the usual approval of the statute of limitations by courts of equity arises from denominating these subscriptions "a trust fund," for the trust in question, being *constructive*, is as liable as any ordinary debt to the operation of that statute. (7 Waite, Actions, &c., 269.)

In the case *In re* Glen Iron Works, 20 Fed. Rep., 674, Mr. JUSTICE BRADLEY, sitting at circuit in Pennsylvania, in the course of a lucid and instructive judgment upon the nature of the obligation as regards creditors, arising from unpaid subscriptions to stock, after a company has stopped business and before call thereupon, said:

"Now, what was the condition to be performed in the present case in order to convert the obligation of the stockholders into a perfect and complete debt? Nominally, as between the stockholders themselves or (which is the same thing) between them and the corporation (which consisted of themselves), the condition was that there should be an assessment by the board of directors and a call, and this could not extend beyond 50 per cent. of the whole subscription. But everybody concedes that this condition need not be strictly and literally performed, and that as to creditors who cannot otherwise be paid than by a resort to the stockholders it is void, and does not require strict performance.

* * * But when such an agreement is adopted in good faith and without any real intent to defraud, equity will carry it out, or at least will pay regard to it, so far as it can be done without injury to the creditors; and will, through the judicial machinery at its command, make such fair and equitable assessment as will produce, by its application to those who are responsible and able to pay, all that is needed to pay all the debts of the corporation. This gives to the stockholders the substantial benefit of their agreement, so far as it can be regarded at all. But this is not a strict performance of the condition. It is only paying such regard to the terms and effect of it as will secure to the stockholders the most essential benefits of it consistent with the claims of the creditors. It is a substituted performance, which answers all the purposes of justice.

"But this action of the court of chancery does not create the obligation to pay; it only ascertains the just amount to be paid by each stockholder. The obligation to pay is founded: *First*, on the subscription to the stock; *secondly*, upon the existence of creditors and debts of the corporation requiring the payment of the subscription to satisfy them. As to such creditors and the debts due to them, the condition is but a spider's web, which the first breath of the law blows away. * * *

"From these considerations it is apparent that the obligation of the subscribing stockholders becomes a *debitum in præsenti* when the debts of the corporation cannot be paid without resort to the unpaid stock; but *solvendum in futuro*—that is, when the fair and equitable amount to be paid has been ascertained and liquidated. It becomes a debt when there are debts of the corporation to pay. The law discountenances any contrary idea, though the amount may be a matter of examination and adjustment" (pp. 680–'1).

In the above case it was held that after a company has stopped business subscriptions to its stock unpaid and uncalled are liable in Pennsylvania to attachment in behalf of creditors. The discussion, therefore, is more concerned with the time when the *debitum* arises than that at which the *solvendum* is to take place. It is now submitted that if the latter can be ascertained only by an action, *cause* of which

arises immediately after stoppage of business, the principles which underlie the above discussion require that such action shall be brought diligently; and that the reason of the thing, as recognized in Diefenthaler *v.* Mayor, &c., 111 N. Y., 331 (cited below, p 20), further requires such diligence to conform, as already suggested, to the statutory diligence demanded of persons having cause of action for that debt which renders the call a matter of any importance.

The application of this case is, that inasmuch as the trustees or the creditors could have made stockholders parties to the suit for a call (Sanger *v.* Upton, 91 U. S., 56), the rights of the latter to protection in any case under the statute of limitations is to be measured by the protection which they would have had in case they had been made such parties, and thereupon had *pleaded* that statute. The trustees or creditors could not by *indirect* proceedings, or by "making two bites of a cherry," deprive the stockholders of rights which they would have had under direct proceedings. If stockholders had been so made parties and had pleaded the Virginia statute of limitations, viz., *five years*, (*Code*, 1860; 637, sec. 5), whilst they would not, by succeeding in such plea, have defeated *the suit*—inasmuch as the corporation might have had other assets than the money due from those defendants—yet it is submitted that no order for payment of the call would have been made against such defendants. And if all the stockholders had been made parties and had successfully pleaded as above and it had appeared that no assets were in existence except the money due from them, it is further submitted that *no call* would have been made, inasmuch as it would have appeared that the debts to which it was an incident were barred, and so it would be *frustra*.

It follows that if, and in so far as, stockholders were not made parties to the bill, and therefore had had no day in court upon their defense, they would be entitled to it whenever brought into court under the call made in such suit: the Virginia stockholders according to the provisions of the

Virginia statute, and non-resident stockholders according to the provisions of those statutes that would have applied if the suit in equity had been brought in the respective States in which they are sued.

This is a conclusion arising upon the reason and spirit of a statute of repose—a conclusion, therefore, as valid for courts of *law* as for any other.

In the present case Hawkins bound himself to abide the discretion of the "president and directors" of the company as regarded calls upon his subscription (folio 228). After the assignment these persons so confided in lost all power to pass upon calls; so that the obligation of Hawkins to abide somebody's *discretion* ceased. The power which a court of equity, therefore, was vested with, of making calls, was only *like* that (*simile*, not *idem*) which the officers of the company had previously exercised. That power owed its existence not to Hawkins, but to the State, and it could be made active only by the suit of some person interested in such activity; and that person possessed such right of suit upon the same terms that persons in general possess rights of suit, viz., subject to the effect of lapse of time, either under some *positive* statute or otherwise.

Upon the whole, therefore, if the suit for a call is to be considered as a mere incident to the suit to recover the amount called—a first step in the general *lis mota* for the money subscribed, it follows that inasmuch as after the stoppage of business the time of making a call was no longer matter of discretion, but was subject to the notice and direction of the law,, the lapse of time before *making application for such call* (the bringing suit therefor) is to be counted in reckoning, under the statute of limitations, whether the suit subsequently brought under such call has been brought in good time.

The case of Diefenthaler *v.* Mayor, &c., of New York, 111 N. Y., 331, throws light upon this contention.

That was an action, under the Code, to set aside an illegal assessment and recover back money illegally exacted thereunder. Upon a question as to what provision of the statute of limitations applied to the case, the plaintiff contended that it was that which provided for suits in equity for setting aside assessments, &c., viz., *ten years;* whilst the defendant contended that it was that which provided for simple action for money, viz., *six years.* Thereupon the Court said:

"So long as a party can unite in the same action his right to have an assessment which is *prima facie* legal declared invalid, with his right to recover back the money paid thereupon, the whole forming one substantial cause of action, there is no color to the claim that the real cause of action lies in the necessity of a judgment vacating the assessment. The setting aside of the assessment in such a case is a mere incident to the legal cause of action to recover back the money paid, and that being so, the legal limitation of six years in which to commence the action should be applied."

The Court thereupon quotes from Borst *v.* Corey, 15 N. Y., 505, in which "it was held that an action to enforce an equitable lien for the purchase-money of land was barred by the lapse of six years after debt had accrued. * * * The Court held that the lien upon the land for the payment of the purchase-money was merely an incident to, and must stand or fall with the debt; and the action to recover the debt being barred by the legal statute of limitations, the action in equity could not be maintained."

The principle now contended for is clearly set forth in the circuit court of the United States for Eastern Missouri in fourteen cases (Glenn *v.* Dorsheimer, &c., 23 Fed. Rep., 695), which in 1885–'6 were heard together by Brewer and Treat, JJ., the present plaintiff being plaintiff there, and other subscribers defendants, upon the same cause of action as that now before the COURT.

When those cases were argued upon demurrer to the petitions, &c., Judge Brewer said:

"As was suggested in the argument, these debts due by the stockholders to the corporation are its assets, and furnish its means for transacting business, and so long as the corporation is a going concern, doing business, it may not need to have these obligations called in; and so while it is a going concern I think it is fair to say, as is said by the supreme court of Mississippi, that theirs is a conditional obligation, and that while the corporation continues to transact business, whether 5, 15, or 50 years, the stockholders' liability continues, and becomes absolute only after a call is made; but that is not this case, and the court in Mississippi draws the distinction very nicely.

"In 1866 this corporation ceased to do business. It ceased to be a going concern. It turned over its property, including the debts due from its stockholders, to the assignees to collect its debts, dispose of its property, and pay its creditors. Whenever such a cessation of business occurs it seems to me fair to say that the liability of the stockholders becomes absolute—a fixed unconditional obligation; and although no call be made by the company or by the assignees, yet these debts from the stockholders could have been reached by the creditors."

The learned judge thereupon cites Ogilvie *v.* Insurance Company (22 How., 380), and proceeds to say that the creditors in the case before him could have taken judgment, and then proceeded against one or more of the stockholders. That view somewhat disregards the circumstance that by the assignment of September, 1866, the debts owing by the stockholders had been segregated under a trust which did not require a previous judgment and return of *nulla bona* for its enforcement, and which, when enforced, would be enforced for all the creditors; but this is not material, and an illustration more nearly conforming to the idea of a *trust*, &c., would be quite as strong in favor of the above argument.

In the same case, after answers had been put in (24 Fed. Rep., 536, July, 1885), it was said by the Court:

"If it be that no cause of action accrued technically until a formal call was made, it is equally true that the assignees should have made the call in a reasonable time after the assignment, or caused the same to be made. They were charged with the duty, adversely to these defendants, to *collect* unpaid subscriptions, or so much thereof as their trust required, and whether the power to make the call remained in the moribund corporation, or was vested directly in themselves, or needed the aid of some chancery court, it was an essential part of their duty to proceed in the execution of their trust with due diligence. The various excuses for the long delay do not rest upon any concealment, fraud, or interference by defendants, and consequently they are not to be affected by what happened without their knowledge or consent. The conclusion is that the statute of limitations applies to all of these actions, legal or equitable."

Subsequently "new suits" were brought (28 Fed. Rep., 907, October, 1886), and thereupon Judge Brewer said:

"The arguments and authorities [*i. e.*, contrary decisions by a number of courts since the decisions above] have in no slight degree shaken my confidence in the strength of the positions assumed and the arguments made by the court at that time, and yet while it has shaken my convictions it has not overthrown them." Judge Treat thereupon interposed to say that his own convictions were more positive.

The *Mississippi* case referred to by Judge Brewer above seems to be Payne *v.* Bullard (23 Mississ., 88), which, with Curry *v.* Woodward (53 Ala., 371, 376), and Allibone *v.* Hager, (46 Pa. St., 48, 54), are cited by Taylor (*Corporations*, sec. 709) as authority for the position: "Accordingly, the statute of limitations does not run against the right of creditors to enforce the payment of unpaid subscriptions until the corporation has ceased to be a going concern."

Payne *v.* Bullard (23 Mississ., 88) was a suit brought by a judgment creditor after a return of *nulla bona* against a stockholder for an unpaid subscription, and the court held that all the while that a corporation is a going concern the money

due upon unpaid stock is so much a trust fund that the statute of limitations is not applicable. Thereupon it added: "In 1841 this bank ceased to elect a directory or to carry on its business. From that time perhaps it might be held that there was a cessation of the trusts, and that the statute might then begin to run. But on this we give no authoritative opinion, because it is clear that six years did not elapse from that period until the filing of this bill" (p. 91).

Curry *v.* Woodward (53 Ala., 371) is a case like the last, in which the court said that the statute of limitations runs only after call on "an evident disbandment of the company and relinquishment of business," neither of which had occurred long enough to give effect to the statute before suit brought.

Allibone *v.* Hager (46 Pa. St., 48) was an action of debt brought by a creditor of a company against it and certain stockholders who had not paid their subscriptions: under a Pennsylvania statute which rendered such subscribers liable to the amount so unpaid for all debts of the company. In discussing it the court said:

"The defendants say they are not liable because in the original incorporation they subscribed the stock mentioned in the certificate as agents of the corporation, and in the same capacity filed the certificate. * * * Whatever might be the law between them and the corporation, as between them and the public the certificate is conclusive. I cannot agree, therefore, with the position that creditors have only the rights and equities of the corporation as against the stockholders. They have the rights which the statute gives; no more and no less. * * *

"A third defense is the statute of limitations—that is to say, it is contended that, inasmuch as the company have not once in eleven years called in the balance of the stock, the statute would be a bar to its recovery from the stockholders. This by no means follows. * * * The principle which ruled the cases of McCully *v.* Pittsburgh, &c., R. Co., 8 Casey, 25; Byers *v.* Same, *id.*, 22, and Same *v.* Graham, 12 *id.*, 77, is not developed in this case. In those cases, by

analogy to the statute, it was held that where the work had not been prosecuted according to the requirements of the act of incorporation and no calls made since the date of the subscription for payments on account of stock, a presumption of abandonment of the project arose in favor of the subscriber, and that six years was a bar to the remedy by call, and to a suit to recover the installments so called for. Here the special verdict finds no facts whatever to bring the case in hand within these principles. We have therefore the case of subscriptions not paid up, but held in reserve by the company, to be drawn upon as needed."

Each of the three cases last cited therefore recognize, more or less definitely, the principle relied upon in Glenn *v.* Dorsheimer, above. The first two are not authorities therefor, it is true, but they give it that sort of sanction which comes of the respectful mention of a supposed principle, coupled with a distinguishing of the circumstances which call it into action from that which mark the case before the Court. In Allibone's case the principles of former Pennsylvania cases, so often cited in this connection, is referred to, admitted, and distinguished. See also, S. P., Harman *v.* Page, 62 Cal., 448.

Before passing to other authorities on behalf of the plaintiff in error, it is perhaps proper to say that Glenn, as trustee, has brought a number of suits upon the same state of facts, in several other States. In only one of these is there a discussion of the argument relied upon here, and in none of them is a distinction observed in citing authorities betwixt those which relate to *going concerns* and those which relate to companies in which the lapse of time relied upon as a bar occurred after the company had stopped business. Some of these cases are as follows:

Glenn *v.* Williams, 60 Md., 95. There the court, after quoting the clause in the subscription: "And the residue

thereof, as required by the president and directors," says that—

"There was no fixed obligation of the stockholder to pay, and no right of action against him until an assessment and call made either by the president and directors or by the order of a court of competent jurisdiction. * * * It was only from the time of the assessment by the decree in the court of Virginia that the statute of limitations began to run. * * * A long time has elapsed since the suspension of the operations of the company, but as we gather from the pleadings in this cause, most of the time has been occupied by litigations of various sorts and in several courts in respect to the assets of the company; and that may account for much of the delay that has occurred in bringing the proceedings in the chancery court at Richmond to a conclusion."

If the record in the above case were like that in the present case, it is difficult to say what was the "litigation" to which the court above refers. The only litigation mentioned in this record is that referred to in the original bill in the Virginia equity suit (folio 36), echoed in the answer of the trustees (folio 209), as having occurred *before* the filing of that bill; whilst at the same time it seems difficult to say how such litigation, if it had been contemporary with that equity suit, could have delayed an *account* and *call*.

But the observation to which the above case is liable is that there is no discussion of the principle now suggested, but only an assertion that the well-known and freely admitted general rules about the application of statutes of limitations to calls govern this case.

Glenn *v.* Howard, 65 Md., 40, holds that his discharge in bankruptcy after the stoppage of business and before a call does not absolve a bankrupt subscriber from the claim arising under such call.

Glenn *v.* McKim, 66 Md., 480, denies that the transfer of the subscriber's stock discharges the transferor.

In Glenn *v.* Soule (and three other cases), 22 Fed. Rep., 417 (E. Louisiana), a very brief opinion is reported; all that is said by the court (Pardee, J.) upon the present question being: "Prescription did not begin to run until the call was made, for until then the unpaid subscription was not exigible. Scovill *v.* Thayer."

In *Scovill* v. *Thayer* (thus cited), 105 U. S., 143, the question (so far as in point as to "prescription") was, whether the action was barred by the statute which required suits by assignees in bankruptcy to be brought within two years, the facts being that the assignees were appointed April 29, 1874; petitioned for an assessment and call March 31, 1876; obtained a call December 4, 1876; and brought suit April 9, 1877.

Inasmuch as the whole bankruptcy proceedings, from the petition to the discharge, make but one suit, it is evident that the language of the court in the above-named case can have no bearing upon questions like the present; for in all such cases the stoppage of business is *created by the suit* under which, as incidents thereto, all litigation in settlement of the estate is carried on. In these, therefore, it seems impossible that any question upon the general statutes of limitation can arise, except as to lapses of time before the bankruptcy, and also those betwixt the date of an order to sue and that of compliance therewith. Discussions in such cases, therefore, and general propositions therein have no bearing upon cases liable like that in hand to important lapses of time betwixt the stoppage of business and the commencement of suits having for their object to wind up the insolvent estate.

As for the special statute of limitations which was under consideration in Scovill *v.* Thayer, it was sought to be applied under circumstances that, no doubt, would have been fatal to the present contention; for the proceedings for a call were brought within the two years limited, and the subsequent action at law within a competent time after the call. The analogy of that case would require that the Virginia

suit in equity should have been brought within three years of the stoppage, and the action at law against Hawkins, as well, within three years after the call; and under those circumstances it is admitted that there would be no ground for a plea of the statute of limitations.

How would Scovill *v.* Thayer have been decided if the petition applying for a call had been filed after two years from the appointment of the assignees? If the COURT had decided such supposed petition to be within time, and that upon no ground peculiar to proceedings in bankruptcy, Scovill *v.* Thayer would be admitted to be an authority against us. As it is, its citation by Judge Pardee contains a suggestion that that learned lawyer, in the hurry of circuit work, may not have thoroughly considered the question before him.

Glenn *v.* Semple, 80 Ala., 159. The Court cites (p. 163), as authorities for the position that the statutes runs from the call, a number of cases in which the time that had elapsed after an insolvency was not important, either because there was no insolvency or because the time was too brief. However, it mentions Curry *v.* Woodward (53 Ala., 370), and calls attention to the circumstance that the language quoted above was a *dictum* and besides does not apply to the facts of this case, in which, as is said, there was no "disbandment." The Court adds:

"We cannot see that the cessation of business by the company and the assignment of its assets can operate on any just principle to set in motion the statute of limitations in favor of stockholders. It is true that this state of facts may prove the necessity for calling in unpaid subscriptions for stock in order to liquidate any outstanding corporate liabilities, but in no sense is it tantamount to an actual assessment and call either by the directors or by a court of competent jurisdiction. The failure of the directors to make such assessment and call is, as we have said, a failure to discharge their duty. They are the agents and representatives of the stockholders, and their dereliction of duty may be justly visited

upon their principals. As against the creditors of the company who have created their debts upon the faith of these subscriptions for stock, the stockholders ought not to be permitted, in our judgment, to take advantage of this wrongful act—this misfeasance of their own agents. * * * The practical operation of such a principle would be fraught with great evils by affording a patent for the easy extinguishment of corporate debts. All that could be requisite would be the making of a general assignment and the postponement of suits against stockholders by protracted litigation in chancery for a period of six years. The present case, with its history of expensive litigation in all its varied and numerous forms, extending through so many years, is itself an unanswerable refutation of the proposition contended for by the learned counsel for the appellee."

How wide this language is of the mark is seen at once, upon reflecting that the company here having determined at an early period that the times were unpropitious for their enterprise, and being convinced that the wide-spread indebtedness of the company required action in court for its settlement, placed their affairs in the hands of trustees whose first business would plainly be to apply to equity for an account and call; such trustees in the event having taken many—perhaps every—other step except that which was absolutely necessary to be first taken, and the creditors standing listlessly by seeing their inaction, and in the end themselves making no effort for more than twelve years to have that preliminary necessary step taken. After all this delay by the trustees and their *cestui que trusts*, when a stockholder asks protection against it, and invokes a reasonable principle of law for that purpose, the answer of a learned court is that the delay is attributable, upon the face of the record, *to the class of which he is a member*, and that success in their contention against such delay *would afford a patent for the easy extinguishment of corporate debts;* a "patent" which, as may be suggested, would be all the more *objectionable* if the *trustees* and *creditors* had waited for twenty-five years, and until

two-thirds of the subscribers had become insolvent, before applying for a call!

Vanderwerken *v.* Glenn [Va. Ct. of appeals; cited here from 17 Washington Law Rep., 86], is another case in which, without discussing the question stated by Judge Brewer, as above, the court holds that the statute runs from the call.

Glenn *v.* Busey, 5 Mackey, 233, went off upon the objection that the plaintiff could not sue at common law in his own name.

Glenn *v.* Saxton, 68 Cal., 333, was decided against the plaintiff upon the objection that the suit was barred, conceding that the statute ran from the call.

Glenn *v.* Springs, 26 Fed. Rep., 494 (N. C.), follows the decision in the present case below, citing The Western R. Co. *v.* Avery, 64 N. C., 491, as authority. That was also cited below in this case. There the company was a going concern at the time of the call.

Glenn *v.* Macon, 32 Fed. Rep., 7, is another Louisiana case, in which the former decision (22 Fed. Rep., 417, above) had been followed.

To resume the citation of authorities on behalf of the present contention:

In Atcheson R. R. Co. *v.* Burlingame Township, 36 Kansas, 628, it appeared that a statute provided that whenever a highway crossing should be injured by excavations, &c., required by a railroad, and such railroad company should fail for the space of 90 days to make the crossing good, the township trustee should notify the county commissioners, who thereupon should appoint viewers to assess damages, and certify their action to the trustee, who, in turn, should demand payment thereof from the company, and, if it failed to pay, bring suit.

The petition in the suit alleged that upon the 3d of June,

1884, the company had for 90 days failed to make a certain crossing good, and that thereupon the township trustee had notified the county commissioners, who had appointed viewers, who, in turn, upon the 18th of June, 1884, had certified damages, which the trustee had demanded of the company, &c.

The company answered, amongst other things, that the crossing had been constructed in 1869, and that the cause of action, therefore, had arisen at the expiration of 90 days after the 9th of March, 1876 (the date at which the statute authorizing the proceedings had been enacted), and thereupon it pleaded the statute of limitations.

Demurrer by the plaintiff; demurrer overruled; trial August 25, 1885; verdict, &c., for the plaintiff; appeal.

After remarking that the action had been brought *fifteen* years after the contruction of the railroad and *eight* after the enactment of the statute, the Supreme Court said:

"On the one hand it is contended that the cause of action accrued within ninety days after the taking effect of the act; and on the other, that it did not accrue until the proceedings were instituted by the township trustee, and demand for the damages assessed had been made by him. We think that the latter theory cannot be maintained. If it could, the township trustee might delay indefinitely the institution of the proceedings and the making of the demand, which are essential to the maintenance of the action. The statute makes it the duty of that officer to take the preliminary step, and it both enjoins and implies prompt action on his part. On cases that had arisen before the passage of the act, it was made his duty to institute proceedings at the end of ninety days from the taking effect of the act, and in cases that arise afterwards it is fair to say that he is required to act within a reasonable time after the crossing is injured, obstructed, or destroyed. The nature of the case is such that he ought to act with promptitude. The interest of the people whom he represents forbids delay. * * * Certainly there is nothing in the duty cast on the trustee, or in the act imposing it, which contemplates a great delay in perfecting the cause of action. To permit

a long and indefinite postponement would tend to defeat the purpose of statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote.

"The period prescribed by the Legislature within which actions that are based on a statutory liability, as is the present one, are to be brought is three years after the cause of action accrues, and not afterward. The preliminary steps to the bringing of the action are to be taken by the township, and these steps should be taken within a reasonable time after the injury occurs or after action is required of the trustee. What is a reasonable time is not always easily defined; but as diligence is required of the trustee, he certainly should have taken the steps essential to the bringing of the suit within the statutory period fixed for the bringing of such actions. There is as much reason for an early commencement of the initiatory proceedings as there is for the institution of the action itself.

"The supreme court of Pennsylvania, in considering the effect of the statute of limitations, held that where a demand or a notice was necessary to found an action, upon the right of action would be extinguished if there was unnecessary delay in making the demand. Justice Thompson, in giving judgment, said:

"'To give effect to the spirit of the statute the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued by the duty of diligence required of the party. Where the time for doing the act necessarily precedent to bringing the suit is indefinite, it allows a reasonable time. When that reasonable time has elapsed the duty of diligence begins, and if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run.' (Morrison *v.* Mullin, 34 Pa. St., 12.)

"In P. and C. R. Co. *v.* Byers, 32 Pa. St., 22, it was held that where a call was necessary to precede a suit for railroad subscription it must, by analogy to the operation of the statute of limitations, be made within the time fixed as a bar against such suit. In Codman *v.* Rogers, 27 Mass., 112, it was ruled that if a demand was essential to the maintenance of an action it might be made within a reasonable time, and that what is to be considered a reasonable time must depend upon

the circumstances of the case; but if no cause for delay is shown the demand should be made within the time limited for bringing the action, and is not in time afterwards. In Steele *v.* Steele, 25 Pa. St., 154, the effect of the claimant's delay upon the starting of the statute of limitations was considered, and it was there said that 'a party cannot stop the running of the statute of limitations by his own negligence or by arrangements for his own convenience.' The same doctrine was strongly sustained in Palmer *v.* Palmer, 36 Mich., 487, in an action upon a promissory note, where a demand had not been made until after the statutory period of limitation had elapsed. In that case the court said:

"'If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time for enforcing his claim by failing to present it. He is really and, in fact, able at any time to bring an action when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues, for the purpose of setting the statute in motion, as soon as the creditor, by his own act and in spite of the debtor, can make the demand payable.'

"The township by its own act could have perfected its cause of action regardless of the wish or action of the other party, and within the foregoing principles and the allegations of the answer the action was barred."

In the above case, therefore, an action might have been maintained to redress a certain injury if brought within a specified period after the taking of an *ex officio* inquisition, such inquisition, as regards the time of it, &c., being a matter wholly within the powers of the person entitled to the redress. If no inquisition had been needed to create a cause of action, the action would have been barred under the ordinary statute of limitations after three years from the injury. The plaintiff brought its action within the specified period after the inquisition, but had neglected to take the inquisition until more than three years after it might first have done so.

Inasmuch as the inquisition and demand were equivalent

to a *call*, it is evident that the decision that the statute of limitations ran from the time when the inquisition might first have been taken is in point here. The general principle involved, viz., that a cause of action subject to a condition precedent the performance of which is entirely in the power of the person who has such cause of action, is, for the purposes of the statute of limitations, to be regarded as an absolute cause of action, seems incontrovertible,—in any case at least where no *contract* places such performance *at the will* of him who is entitled.

In Chalfin *v.* Moore, 9 B. Mon., 496, ejectment had been brought in 1846 upon a title conferred by a sheriff's deed executed in 1833, because of a sale made in 1823. Thereupon, in reference to the statute of limitations, the Court held that inasmuch as the purchaser *might have had* a deed at any time since the latter date she was to be treated as if she had actually demanded and received one then.

In its opinion the Court referred (as presenting a *striking analogy*) to the rule that, although no cause of action for usury paid exists without a demand, yet unless demand be made within *five* years [the period prescribed in the Kentucky statute of limitations for bringing suits of that class] the suit itself will be barred: "The reason is that although the cause of action does not accrue until demand made, yet as the claimant has it in his power to create the cause of action when he chooses, his failure to do so for five years is equivalent to a failure to sue for the same length of time on a cause of action that has actually accrued" (p. 498.)

Pittsburg, &c., R. Co. *v.* Byers, 32 Pa. St., 22, cited in the above Kansas case, was *assumpsit*, brought April 16, 1857, upon a subscription for stock made June 13, 1847; notice to pay having been given March 1, 1857. The Court adverted to the circumstance that by its charter the company was to begin to construct its road within five years, &c., as

indicating that the Legislature intended that the subscribers should not be indefinitely bound to answer calls, and says:

"Taking it for true, then, that the company could not sue until after demand and notice, were they at liberty to delay these beyond six years [the time limited in the Pennsylvania statute in suits upon that sort of debts], and then have a right to sue within six years thereafter? We think not. * * * Judge Wilde's observation [in Codman *v.* Rogers, 10 Pick., 112] that there is the same reason for hastening the demand that there is for hastening the commencement of the action, is peculiarly applicable to a case like this, where the demand is held to be part of the remedy by action. * * * In Steele *v.* Steele, 1 Casey, 156, it was said, 'a party cannot stop the running of the statute of limitations by his own negligence. We hold thereupon that the company were bound to demand payment of the subscription within six years from its date, or at least to call in an installment within that period."

Inasmuch as in the above case the court found in the context to the subscription evidence that the calls were not, as regards the time of making them, to be at the discretion of the company, it appears that it is authority upon the question of negligence after *discretion* has been put an end to by the company's ceasing to do business.

Morrison *vs.* Mullin, 34 Pa. St., 12, also cited as above, was assumpsit brought by a sheriff in March, 1845, upon a refunding receipt given upon payment, April 12, 1823, of money by the plaintiff in settlement of an execution: the receipt being conditioned that "if it should, on a settlement of liens" upon the land which had been sold, be found that the party who received the money was not entitled, he would refund it in part or all. In April, 1839, in the course of a suit brought by a person interested in the liens above mentioned (the executor of Woods), it was decreed, in effect, that the party who had given the receipt was not entitled to all that he had received. Thereupon, in the principal case, the

Court held that as between the parties to the receipt, it had been the duty of the sheriff to become *actor* and procure a settlement of the rights in question, and that his relying upon the effect of the action brought by another party against himself for that purpose was done at his own risk. So that the sheriff was barred by the rule:

"Where the time for doing an act necessarily precedent to bringing suit is indefinite, the law allows a reasonable time. When that reasonable time has elapsed the duty of diligence begins. And if this consists in the assertion of a legal right, then is the time when the statute should begin to run. That would be no reason for delaying its operation unless found in the nature or terms of the transaction. * * * In the case in hand it is obvious that to entitle the plaintiff to call for a return of the money, he was to become the actor and procure a settlement of the rights of distributees of the money made on the sale of the land. This is the place which he assumed to occupy with Morrison. He did nothing toward it within six years, and we think that the application of the principles cited should bar him. He cannot excuse his want of diligence by the laggard pursuit of what he alleges was the same object by Wood's heirs in their suit against him, to which Morrison was no party and of which he had no notice. If he chose to indulge them for sixteen years it might be at his own expense. With this the defendant had no concern. He should within six years at least have had his right to sue settled, as was required in R. R. *v.* Byers and Codman *v.* Rogers. After that period Morrison or his representatives had a full right to claim that his promise lived no longer."

Keithler *v.* Foster, 22 Ohio, 27, was a *civil action* against a sheriff and his sureties in an official bond, brought March, 1868, for money received on execution July, 1855, demand having been made December, 1867. The statute of limitations barred such suits after ten years.

The Court quotes from Angell, Limit., sec. 96, and says: "Where no demand is shown to have been made within the statutory period for bringing the action for the purpose of

setting the statute in operation, a demand will be presumed at the expiration of that period, from which time the statute will begin to run."

This rule differs in detail from that above mentioned. The case, equally with others, concedes an application of the statute to the demand, but in the absence of evidence thereon presumes conclusively that this demand occurs at the close of the time limited by the statute, so that in that case the action would not have been barred until July, 1875. Where, as in the present case, the demand or call was necessarily matter of record in the course of a suit, it seems that such *presumption* as to demand could not arise in the absence of a record thereof.

Palmer *v.* Palmer, 36 Mich. 487, also cited in the Kansas case above, was an action upon a note dated October, 1867, payable "thirty days after demand," which was made in May, 1874. From the context the court concluded that the parties had not intended that it should run for any considerable time, and said:

"In Morrison *v.* Mullin, 34 Pa. St., 12, it was held that where demand was necessary to found an action upon, the demand was barred unless made in six years, and the right of action extinguished by the delay.

"We cannot but think this to be sound doctrine. Whatever may have been the ancient prejudice against statutes of limitation, they are now regarded as just and entitled to be fairly construed. If a creditor has the means at all times of making his cause of action perfect, it would be unjust and oppressive to hold that he could postpone indefinitely the time of enforcing his claim by failing to present it. He is really and in fact able at any time to bring an action, when he can by his own act fix the time of payment. It is no stretch of language to hold that a cause of action accrues, for the purpose of setting the statute in motion, as soon as the creditor by his own act and in spite of the debtor can make the demand payable. It may be otherwise, possibly, where delay is contemplated by the express terms of the contract,

and where a speedy demand would manifestly violate its intent."

Consideration of the above cases shows that neither one of them violates the rule that where *call* or *demand* is, by virtue of contract betwixt the parties, placed at the unlimited discretion of the person entrusted therewith, the ordinary statute of limitations does not apply to his delay in making demand. In the *Dorsheimer* case (just as in the present case) the time which elapsed before the call was applied for was in regard to a right of call given, as is said in the Glen iron case, not by contract, but by the law. In the Kansas case it was delay in making a demand incident to a tort. In the Pennsylvania case, cited from 32 Pa. St., although the company was a going concern at the time of demand, the context showed that the transaction differed from ordinary cases of going concerns inasmuch as a limit was placed upon the time for constructing the road. In the second Pennsylvania, and the Kentucky, case the delay was given by a rule of law and not by contract; and so also in the Ohio case; whilst the context in the Michigan case makes that like the former of the two Pennsylvania cases.

In conclusion, it seems proper to say that none of the cases which disregard the principles above laid down meet the reasoning upon which it is based. As has already been said, they simply *ignore* the distinction taken, and generally cite cases which establish the *rule* which is not questioned by those who contend for the *exception* under consideration.

As for the suggestion that the cases cited from Pennsylvania, Ohio, and Michigan go upon *equitable* principles proper enough to courts which ignore the distinction betwixt law and equity, but inadmissible at common law, the reply is that these cases proceed upon *an application of the statute itself*, and that there is no difference betwixt the construction placed upon statutes in equity, and that at common law (3 Black., 430), and that this rule is observed in

Pennsylvania is shown by Judge Sharswood's note, 22 to p. 61, of Book I of his edition of Blackstone. It may not be so certain that Codman *v.* Rogers, 10 Pick., 112, actually proceeded upon the equity of the statute, or upon principles peculiar to *courts of equity*. The general reasoning, however, seems to be quite as pertinent for a court of law as for a court of equity.

PHILLIPS, LAMAR & ZACHRY,

For Hawkins.

APPENDIX.

The North Carolina statute of limitations applicable here, "according to the subject-matter of the action, and without regard to the form" (Code C. P., 1868, sec. 16) is as follows (Rev. Code, 1854, chap. 65, sec. 3):

"All actions of * * * account, upon the case; * * * debt upon any contract without specialty; * * * shall be commenced within the time and limitation by this chapter directed and not after—that is, * * * within three years next after the cause of action accrued."

A later statute, first enacted in 1868, but not applicable to causes of action which accrued before the 18th of August, 1868, repeats the above provisions substantially (Code 1883, sec. 155).

Under either provision causes of action arising since the 1st of May, 1865, are not subject to any statute in suspension of statutes of limitation (Cannon *vs.* Morris, 81 N. C., 139).

Some statutory provisions in Virginia, of more or less interest in connection with this action, are as follows (*Code*, 1860):

"The process to commence a suit shall be a writ commanding the officer to whom it is directed to summon the defendant to answer the bill or action" (p. 706, sec. 5).

"It shall be sufficient to serve any process against or notice to a corporation or its mayor, director, president, or other chief officer, or, in his absence from the county or corporation in which he resides, or in which is the principal office of the corporation against or to which the process or notice is, if it be a city or town, on the president of the council, or board of trustees, or, in his absence, on the recorder or any alderman or trustee; and if it be not a city or town,

on the cashier or treasurer; and if there be none such or he be absent, on a member of the board of directors, trustees, or visitors" (p. 707, sec. 7).

"Upon every subscription for shares in any joint stock company not provided for by the preceding section [*i. e.*, not a 'bank of circulation'] there shall be paid upon each share two dollars at the time of subscribing and the residue thereof as required by the president and directors" (p. 331, sec. 3).

"No stock shall be assigned on the books without the consent of the company until all the money which has become payable thereon shall have been paid; and on any assignment the assignee and assignor shall each be liable for any installments which may have accrued or which may thereafter accrue, and may be proceeded against in the manner before provided."

"A person in whose name shares of stock stand on the books of the company shall be deemed the owner thereof, as it regards the company" (p. 334, secs. 24–25).

IN THE

Court of Appeals of Maryland.

John Glenn, Trustee, vs. *J. S. Williams & Brother.*

BRIEF OF JOHN HOWARD, OF COUNSEL FOR APPELLANT.

IN THE

Court of Appeals of Maryland.

JOHN GLENN, TRUSTEE vs. J. S. WILLIAMS & BROTHER.

BRIEF OF JOHN HOWARD FOR APPELLANT.

Statement of Case.

The National Express and Transportation Company was chartered by the Legislature of Virginia on the 12th day of December, 1865, subject to the general laws touching corporations and chartered companies contained in the 56th and 57th chapters of the Code of Virginia (1873) pp 535–554, and Record, p. 189. Its authorized capital stock was five millions of dollars (with the privilege of increase to ten millions), divided into shares of $100 each, on which two dollars per share were payable at the time of subscription, and the balance as called for by the president and directors. Its name indicated that it was national in its objects and operations, and a national and distinguished citizen, General Joseph E. Johnston, was the first corporator named in its charter, and its first and only president, until near its collapse; and among its directors were well known representatives of large capitalists and subscribers in the different States. The project was daring and ambitious, but its hopes were well founded, and with reasonably good management and faithful payment

of their subscriptions by the stockholders as called for, should have been eminently successful. Prominent capitalists and business men in New York and Baltimore took the leading number of shares (New York, 12,032 shares, and Baltimore, 4,044 shares), and thence in precedence St. Louis, Mo. (3,270 shares), Richmond, Charlottesville, Lynchburg and Staunton, of Virginia (aggregating 8,790), Augusta and other cities of Georgia and New Orleans, the stock being distributed through eight States and the District of Columbia (p. 78).

The company had no capital except its subscriptions. A sufficient amount was paid in to commence business. Several calls and assessments were made by the president and board of directors, amounting in the whole to twenty per cent. of the subscriptions, a large part of which however was unpaid, and the company in consequence soon became involved in pecuniary embarrassments. Richmond was the legal site of its principal office, but Baltimore was the chief centre of its business, the main line of which extended from New York to New Orleans, with branch lines on either side into and through the adjacent States. A large amount of the capital paid in was necessarily expended in equipments distributed in numerous localities throughout the different States, which, as might have been expected, proved to be of little available value upon its failure. Meanwhile, it had contracted a large amount of indebtedneas all along the lines of its operations in New York, Pennsylvania, Maryland, the District of Columbia, Virginia, West Virginia, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Ohio and other States. (Pp. 45–153.) This indebtedness, contracted upon the faith of the said subscriptions, was due for transportation of its express matter along the lines of the various railroads, for services rendered by its officers, agents and employees, and for money borrowed to carry on its business, which was made necessary by the default of the stockholders to pay the calls levied upon their subscriptions by the president and board of directors. Perhaps upon so little paid in capital, no young company of the kind ever carried on such large and extensive operations, or enjoyed more brilliant prospects. The enterprise, however, was new, and was confided to inexperienced hands, and it encountered hostilities from rival companies; and from these and other causes, but chiefly from the failure to collect, when needed, a sufficient amount of the capital subscribed, by August, 1866, it found itself in such a paralyzed condition, that, in justice to its creditors, it soon thereafter,

to wit: on the 20th day of September, 1866, executed a general deed of assignment to trustees of all its assets in trust for the payment of all of its debts. The prospect, however, of realizing successful results from the enterprise was not yet relinquished by the stockholders. There were among them many honest and honorable, as well as good business men, who felt keenly the just reproach of having failed to pay their creditors on the one hand, and the apprehension of a total loss and failure of the enterprise on the other. Thus it was that at a general meeting of the stockholders held in Richmond in October, 1866, after having inquired into the condition of the company, and approximately ascertained its indebtedness to be $273,000, the following important significant resolutions were passed:

"1. That the stockholders see nothing to induce despair at the ultimate success of the enterprise.

"2. That with a fund of subscribed stock yet untouched, in the hands of solvent stockholders, amounting to $3,000,000, of which less than one tenth will discharge all of our liabilities, and less than one-fifth will enable the company to proceed prosperously with its operations, insolvency is absurd, and failure to succeed wholly unnecessary.

"3. That to pay the debts and resuscitate the credit of the company is the first duty and purpose of the stookholders, to which end every shareholder is already pledged and bound by law to the full extent of the stock owned or subscribed by him.

"4. That this meeting being satisfied that *thirty* per cent. of the stock already subscribed will suffice to pay the debts and prosecute the business of the company successfully, would now, if it possessed the legal power, reduce the stock to three-tenths of the original amount.

"5. That in addition to the requisitions heretofore made, amounting to twenty per cent., the president and directors be instructed forthwith to make an additional assessment of ten per cent. upon the stockholders, and proceed without delay to enforce payment of all dues.

"6. That the operations of the company be suspended until the stockholders shall have responded to the requisitions upon them to supply a fund sufficient to pay the debts, and extend the business without further embarassment.

"7. That the creditors have in the obligation, willingness and

ability of the stockholders to pay, with honorable promptitude, the debts respectively due, the amplest security therefor. They are respectfully appealed to to forbear such proceedings as can only tend to delay, embarass and injure the company without in anywise hastening that result of speedy liquidation which the stockholders desire and aim at not less earnestly than themselves.

"8. That the stockholders now present address themselves with confidence to their fellow-stockholders, urgently, but most respectfully, reminding them that they cannot and ought not to seek to evade responsibility for the debts already incurred, and that in justice to all concerned the commercial enterprise on which we entered, so needful as it is to the business of the country, and of which we esteem the future success already assured, cannot be abandoned without eminent discredit. They therefore trust that each stockholder, for his own sake, and for the sake of the company, will respond promptly and fully to the calls made upon him"—pp. 96–98.

And these resolutions, together with a flattering statement of the condition of the company, tending to show that "insolvency is absurd and failure to succeed wholly unnecessary," were caused to be published in the Richmond *Whig* newspaper of October 31st, 1866—p. 81, p. 94. And among the officers elected were three prominent citizens and stockholders, of Baltimore, namely: Wm. H. Perot, as president of the company, and E. J. Foley and Wm. Devries as directors.

Unfortunately, however, these strong convictions of plain legal and moral duty, and instinctive suggestions of honesty and honor so elaborately proclaimed to the world in pledge of prompt payment of the debts contracted upon the faith of the binding subscriptions to the stock, and upon which the creditors were implored still more indulgently to rely, as they had already too long relied in vain, turned out to be the bubbles of a moment, bright to the eye, but delusive in the grasp. The resolutions were but the mockery of lofty protestations and promises unfulfilled, added to accumulated injustice, hardship and wrong.

Nothing further was ever done by the stockholders, or by the company, or its officers, the president and directors, to pay any debt whatever of the company. On the contrary, every possible obstacle was thereafter thrown into the way of the creditors everywhere, alike by the stockholders and by the officers of the company, and until lately

by the trustees in the said deed of assignment, to oppose and obstruct the collection of their debts. Pp. 15–16, 180–181.

The company abandoned its business in November, 1866, and one of the pleas of the defendants, Williams & Brother, in the present action, is, that its affairs went into the hands of a receiver, and continued in his hands until within a few days of the date of the decree of the Chancery Court of Richmond under which the present action was brought. But the said defendant stockholders nowhere pretend in any plea that they, or their co stockholders have at any time, or in any part, or to anybody, ever fulfilled, or offered to fulfil, their said several high-sounding promises of honesty and honor, to pay their unpaid subscriptions in satisfaction of the debts contracted upon the faith of the solvency and integrity of the subscribers, or that they have done anything else even looking towards an intention to discharge the grave, legal and moral duty, the obligations of which they so publicly and pomposly paraded their purpose to perform, under an acknowledged penalty of "Eminent Discredit" for failure of performance.

Undoubtedly, the honest and honorable stockholders in Baltimore and elsewhere, in thus, by solemn resolutions, pledging themselves to pay the just debts which had been so trustfully contracted upon the good faith of their subscriptions, did not transcend the obligations which had already been imposed upon them by the terms of their contract and by the plain principles of equity and justice which the courts are competent to enforce and are in the daily employment of enforcing.

In the familiar and often cited case of *Alden* vs. *Milwaukee Bank Company*, 13 Wisconsin, 61, the Supreme Court of that State says:

"It would be much against reason and common justice, if the stockholders of an incorporated company, like the principal defendant of this action, after having paid in the amount of their stock subscriptions according to the requirements of this charter" (in this case, $2 per share of $100), "should be permitted afterwards, and without first discharging the liabilities of such company to the extent of such subscriptions, to withdraw their stock and leave its creditors unsatisfied. It would be equally contrary to the plainest principles of law and equity, as well as common sense, after having subscribed the requisite amount of stock to give the corporation a legal existence,

though the same should remain in whole or in part unpaid, and after having organized it, to allow them through their own or the willful neglect and dishonest practices of its officers, to refuse to pay in so much of such unpaid stocks as may be necessary to discharge the fair and just debts due from the company, and which have been contracted on the foundation of such subscription and organization. The stockholders being in general free from personal responsibility, the capital stock constitutes the sole fund to which creditors look for the liquidation of their demands. It is the basis of the credit which is extended to the corporation by the public, and a substitute for the individual liability which exists in other cases.

"So far as creditors are concerned, it is regarded in the law as a trust fund, pledged for the payments of the debts of the corporation. Until they are paid the stockholders are postponed; they are only entitled to that which remains after the claims of the creditors are exhausted. This is as true of the unpaid shares subscribed, or balance due thereon, as of the amount which has actually been paid in. Such unpaid shares or balances are as much a part of the capital stock as the sums which have already been realized thereon. Aside from the funds on hand, they often constitute the only resource of the company. They are debts due to it, the payment of which can be enforced by its officers. The delinquent subscribers are its debtors, and the directors are clothed with authority to compel them to pay. When the company is indebted and other means of meeting its liabilities are exhausted, the exercise of this authority becomes a duty which they are under the highest moral obligation to perform. Creditors are supposed to have trusted as well to such unpaid subscriptions and to the fair and faithful exercise of such compulsory power for their payment, as to the funds actually paid in, and when it becomes necessary to their security or satisfaction, they have a legal right, either by the voluntary action of the proper officers or through the aid of the courts of the country, to such exercise of it. If, therefore, by the wilful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties, a court of equity will, on a proper application, afford the requisite relief. The following authorities cited by the counsel for the appellant clearly establish that, at the common law and without any statutory authority for that purpose and as a sort of distinct exercise of equitable jurisprudence, courts of chancery will grant

relief in such cases. They are: *Spear* vs. *Grant*, 16 Mass., 9; *Vose* vs. *Grant*, 15 *id.*, 505; *Wood* vs. *Dummer*, 3 Mason, 308; *Ward* vs. *Griswoldville Man. Co.*, 16 Conn., 593; *Mann* vs. *Pentz*, 3 Comst., 415; *Nathan* vs. *Whitlock*, 9 Paige, 152; *Henry* vs. *V. & A. R. R. Co.*, 17 Ohio, 187; and *Ogilvie* vs. *Knox Ins. Co.*, 22 How. (U. S.), 380. These authorities also sustain the general principle above stated.

In *Upton* vs. *Hansbrough*, 3 Bissell C. C. R. 425, the court in referring to the above case, said: "In *Adler* vs. *Milwaukee Bank Company*, 13 Wisconsin, 61, DIXON, Ch. J., in discussing the liability of stockholders to pay for their stock upon call of the directors, says when the company is indebted 'this duty of the directors to make the call is one of the highest of moral obligations,' and further, '*if by the wilful or stubborn inaction of the directors or stockholders the company fails to meet its obligations and perform its duties* (to make assessment), *a court of equity will, on a proper application, afford the requisite relief.*' It is not within the ingenuity of man to devise a scheme that will enable insolvent debtors, and persons indebted to them, to withhold from the creditors of such insolvents the assets which in equity and good conscience should be applied to the payment of such creditors. Courts of equity, by virtue of their inherent jurisdiction over trusts and frauds, will enforce the proper application of the capital stock of an insolvent corporation to the payment of its debts."

And in *Upton* vs. *Tribilcock*, 1 Otto (91 U. S. R.) 47, the Supreme Court of the United States said: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts." And see the recent and extraordinary case in the same high court, of the *County of Morgan* vs. *Allen*, 103 U. S. R. (1880), p. 508. The learned Court of Appeals of Maryland, as will hereinafter appear, has approved and illustrated the same plain principles of common sense, equity and justice.

With a full knowledge and recognition of these principles, and admitting them to be embodied in the terms of their contracts of sub-

scription, it has been seen that so far from fulfilling their acknowledged obligations, the stockholders have ever since repudiated and failed to meet the conceded requirements of good faith and fair dealing among men.

As above indicated, the collapse of the company was complete. There was, of course, a race of diligence among local creditors by attachments and otherwise to rescue something of the *debris* of the scattered and worthless assets in the way of a few horses and wagons and office furniture, here and there, bought at greenback prices soon after the war in the full inflation of the currency, and distributed over thousands of miles and amidst hundreds of places, and in the hands of unpaid employees and agents, or abandoned, stolen or lost.

Illustrations of the practical worthlessness of the scattered assets will be seen in the fact, that on the very day that the company executed a general deed of assignment of all its property in trust for the payment of its debts, it voluntarily suffered judgments in Richmond in favor of its counsel for professional services rendered in its difficulties, upon which executions were returned only partially satisfied (pp. 53, 54, 55); and in the further fact, that the State tax upon its business during the brief period of its operations in 1866 was collected by enforcing a special statutory liability upon a stockholder resident in Richmond. *Anderson* vs. *Commonwealth*, 18th Grat. 295; and it is observable that the Supreme Court of the State remarked (p. 299) as a reason justifying the harsh statute, that such companies "do business by means of railroads and steamboats belonging to others, having very little visible property of their own."

In this general condition of things the chief creditors naturally found themselves much embarrassed, and difficulties arose on every hand as to the proper mode of procedure to realize their debts. The company was a Virginia corporation and all of the debts it had contracted were due and payable by it in Virginia, where alone it had any legal existence, and according to whose laws payment could most properly be enforced. On the other hand, all of the debts contracted to it were due to it in Virginia, and notably the unpaid stock subscriptions, and all of its assets, wherever situated, constituted a trust fund for the payment of its debts.

But the debts were due to many and different citizens in eight or ten States, and the subscriptions were made by different citizens in equally as many States, and the unpaid subscriptions constituted

the only fund for the payment of the debts, wherever it might be diversely scattered in distinct and distant localities in the hands of stockholders. The case was extraordinary, if not anomalous. What was to be done?

In the first place different opinions arose as to the validity and construction of the general deed of assignment, and meanwhile suits by stockholders and by creditors were instituted in the different States of New York, Maryland, and Virginia with various and different alleged objects, and between various and different parties, all of which, however, in one way or another, sought to prevent or to realize the payment of the debts out of the unpaid subscriptions, and in all of which, by this or by that pretense, the stockholders have thus far managed to evade liability. In New York an injunction (pp. 180, 181) obtained upon a stockholders' bill in 1866 still restrains the collection of the subscriptions in that State, and its dissolution will depend upon the validity of the proceedings in Virginia, out of which the present action arose, and which were designed and so framed as at once to supersede, in effect, all other proceedings seeking collection of the unpaid subscriptions and to remove the obstructions thrown up by the stockholders to defeat that end.

In *Baltimore and Ohio Railroad Co.* vs. *Glenn and others*, 28 Md., p. 287, this learned court had occasion to consider the nature of this company and the validity of its general deed of assignment for the benefit of its creditors. The result of the decision in that case was to establish the validity of the deed and to set aside the order appointing a receiver. The leading object of that suit was thus defeated. It does not appear to have been further prosecuted, and it is understood that the papers in the case were lost.

The special attempts of certain of the creditors in this State and elsewhere to realize their rights against the company were proceedings against certain of the stockholders to recover the whole amount of their unpaid subscriptions.

The suit out of which the present action arose was designed to enforce, in one suit, a settlement of all the debts of the company, according to the preferences in the deed of trust, by a *pro rata* assessment upon all of its stockholders. The stockholders in different States were beyond the reach of process, but the company and the trust fund were within the jurisdiction, and that was

enough, it was thought, to prevent the defeat of equity and justice, and the further triumph of wrong.

It was a creditors' bill brought in the Chancery Court of the city of Richmond, Virginia, by the late W. W. Glenn, against the said National Express and Transportation Company, its president and directors, and the trustees in the said deed of trust, to obtain in Virginia, the State under the laws of which said company was incorporated, and in which the said deed had been executed, delivered and recorded, a judicial construction of the character and legal effect of the said deed; to ascertain the amount of the indebtedness of the corporation, and to require such an assessment to be made upon all unpaid subscriptions to the capital stock, as might be necessary and proper for the payment of the said indebtedness, and generally to facilitate and secure an execution of the trusts of the said deed. (See bill, Rec. pp. 3–10, and amended bill, pp. 14, 18, and for the deed see pp. 11–13.)

The orignal bill was filed in December, 1871 (p. 3), but the cause was not regularly matured for hearing until October, 1879—a circumstance, however of no importance whatever (as will hereinafter be seen), and the pendency of proceedings elsewhere will sufficiently explain the absence of activity in its prosecution until the inefficiency of those proceedings was made manifest.

Jurisdiction was duly acquired over the defendants by service of process according to law; as to the defendant company (in the absence of its presdent, William H. Perot,) by service alike upon M. B. Poiteaux, cashier, and upon Joseph R. Anderson, one of the directors, resident in the city of Richmond (pp. 32, 33); and also alternately by an order of publication and posting (page 35), as prescribed by statute (see Virginia Code of 1873, ch. 166, §§ 7, 11 and 12), as to Joseph R. Anderson and Lorenzo Norvell, directors (pp. 80, 81, 99), by personal service of process (page 32, page 33), and as to the president and the non-resident directors, and the surviving trustees, Hoge and Kelly (also non-resident), by order of publication and posting. (Page 33, page 35.) At September Rules Poiteaux filed an answer (pp. 33, 34), and at the same Rules (p. 35), the original and amended and supplemental bills were taken for confessed as to all of the defendants, except Poiteaux, and was set for hearing as to all parties. On the 6th of October, 1879, by leave of court Anderson filed an answer, and the cause

having been regularly matured and set for hearing, and the bills having been taken for confessed as stated, the honorable court entered a decree (p. 36) directing one of its commissioners to report:

"1. An account of the debts due by said defendant, the National Express and Transportation Company, and the priorities thereof, if any.

"2 An account of the assets of said defendant company."

After due publication of the time and place of taking these accounts, Commissioner Kean commenced the performance of his duties on November 8th, 1879, and was laboriously engaged from time to time in executing the decree until 19th day of June, 1880, when his report was filed. (Pages 42–154.) During the same term Hoge and Kelly, surviving trustees, tendered their answers to be filed, but they were not filed until the next term, when they were filed *nunc pro tunc.* (Page 155.)

The report above mentioned was an elaborate and voluminous report made by an intelligent master commissioner of the court, and it showed numerous debts and a large aggregate indebtedness, but not greater in number or larger in amount than might well have been expected in the case of an experimental corporation (without paid up capital) of a character national in its business as well as its name, extending its operations along continuous and branching lines through many States—from New York to New Orleans—and necessarily employing and contracting to pay the numerous railroads over which its business was done, and an army of officers, agents, clerks, laborers and other employees, and in addition, loans of money received to carry on its business.

The railroad companies north of Philadelphia do not seem to have given the company much credit, and therefore had no claims; but, commencing at Philadelphia, the debts of the company of every description were left unpaid (as were numerous small debts in New York), and many were reported as due. The Philadelphia, Wilmington and Baltimore Railroad Company (pp. 41–48), the Baltimore and Ohio Railroad Company (p. 38), the Bank of Commerce, Baltimore (p. 39), and the estate of W. W. Glenn (p. 45), whose claims are reported by the commissioner as established by documentary and oral evidence and the books of the company (which were before him) are prominent creditors for services rendered or money lent. In an account of such a multitude and variety of claims, proofs of each

and every claim as they appeared on the books of the company or otherwise, were not and could not be returned, nor was it usual or necessary. But sufficient appears to show that a careful inquiry was made into the whole and every part of the indebtedness, and that the commissioner faithfully executed his duties. The largest claim reported as established is that of Bash, trustee (p. 46) which like the rest stood upon the books of the company and other evidence.

On the 10th of July, 1880, the cause was continued until the next (October) term (p. 154). The said report, filed in the clerk's office, was open to all just exceptions. No exceptions were filed. Ten days is the required time for such a report to lie before confirmation, Code, ch. 171, sec. 10. When nearly six months had expired, and there still being no exceptions filed, the case came on to be finally heard and on the 14th day of December, 1880, the court delivered an elaborate opinion upon the questions involved and entered a decree in accordance therewith (pp. 192–198 and pp. 155–174). In substance the court established the validity of the deed in accordance with the decision of this learned court in the above case of *Baltimore & Ohio Railroad Company* vs. *Glenn*, 28 Md., 287, construed the effect of the deed to be to convey and assign to the trustees, for the benefit of the creditors, all of the property, assets and credits of the said corporation, including the right to receive the unpaid subscriptions to the capital stock, but not the right to levy assessments upon the same, that being a franchise vested in the president and directors, and not passing by the deed; confirmed the report of the said commissioner in respect to the debts of the corporation, and as to the amount of the call or assessment which should be made upon the unpaid subscriptions, and it appearing that the president and directors had long failed in their duty to make the necessary call and assessment for the payment of the debts, the court itself performed that duty in its decree by making a call and assessment of thirty per cent. upon the unpaid subscriptions which it had thus judicially ascertained to be necessary and proper for the execution of the trusts of the said deed; and for the more efficient administration of the said trusts, it removed the surviving trustees in the said deed, and substituted in their stead John Glenn, of Baltimore, the appellant in this case, who was clothed with all the powers, and charged with all the duties of the original trustees in said deed, and who duly qualified by giving bond with approved security, as required, in the penalty of $100,000 (p. 198).

In *Balt. & Ohio R. R. Co.*, vs. *Glenn*, *supra*, this learned court had considered the deed to be a general deed of assignment, conveying all of the property and effects of the company for the payment of its debts, and so regarding it, had held it to be valid and effectual for the accomplishment of its objects. The Chancery Court of Richmond, in its said decree, held the same view of the deed, and only in addition did what was necessary and proper to effectuate the accomplishment of its objects. The present suit was brought to recover the amount of thirty per cent. on the unpaid subscriptions of the defendants, Williams & Brother, who are stockholders in the said corporation, and are indebted to the said corporation to the amount of their unpaid subscriptions. And this is a plain statement of the appellant's case. The declaration sets forth in substance the above facts.

DEFENCES PLEADED.

The defences pleaded are all of a technical character and do not reach the merits and justice of the claim. They consist of pleas of limitation and alleged want of parties to the Virginia suit and the pendency of other suits. It is not denied that the defendants are stockholders to the amount charged, and it is not claimed that they have ever paid their subscription. The same is therefore due unless it has been barred by some statute of limitation; and the corporation having made a voluntary assignment of the same in trust for the payment of its debts, the unpaid part of the said subscription is due to the trustee in the deed, unless it has been so barred. The debts of the company to a large amount beyond question still remain unpaid, and in justice, the trustee is entitled to receive the trust assets for their payment.

In the State in which the company was incorporated and alone has existence; in which the deed of trust was delivered and recorded, and by whose laws its validity, construction and effect are determined; in which alike the debts due by the company and the debts due to the company are payable;—a court of competent jurisdiction has construed the deed, has ascertained the debts due by the company and the amount of the trust money in the hands of the stockholders required for their payment; has judicially determined the necessity, propriety and amount of an assessment upon that trust fund, and

because of the continued failure of duty on the part of the agents of the holders of that fund to make an assessment has itself made the required assessment in furtherance of the execution of the trusts of said deed and in effectuation of justice, and has substituted and supplied a hand to collect and bring in the needed trust money to be administered under its judicial supervision and direction in faithful fulfillment of the honest intentions of the company in making the deed. The case of the appellant, therefore, now before this honorable court, has every consideration of reason, equity and justice to commend it to favorable attention.

The fund sought to be realized is a trust fund in the hands of the defendants, dedicated, not only by the law, but by their own deed of trust, to the payment of debts contracted upon faith of the said fund, and the struggle on their part is to get rid of the demand by technical pleas in evasion of a plain legal and moral duty.

Undoubtedly, unless the demand is barred by lapse of time, the plaintiff is entitled to recover, if the creditors have pursued the right remedy in putting him forward to collect their trust money for the payment of their debts.

Taking up the defences rather in logical than in numerical order, we propose to consider first the several pleas of the Statute of Limitations.

I. Plea number 5 alleges that the debts in the declaration mentioned, for the payment of which said alleged decree of the Chancery Court of the city of Richmond, Virginia, was passed, did not accrue within three years before the institution of this suit; and in this connection it will be convenient to consider also plea number 6 to the effect that the said debts did not accrue within twelve years before the institution of this suit. To both of these pleas the plaintiff demurred.

The answer to these pleas is (1), that this is not an action against the corporation to recover the said debts, but if it were, being based on the decree of a court of competent jurisdiction in the State of Virginia, *nul tiel record* would be the only plea (other than fraud in the procurement, or want of jurisdiction) open to the defence, and neither *nil debet* nor the Statute of Limitations, nor any other plea affecting the original merits, would be admissible. *Mills* vs. *Duryee*, 7 Cr., 481; 13 Pet., 312; 18 How., 404.

And the said decree establishing the said debts being against the

corporation, if the present action were a proceeding in Maryland by the creditors against the corporation and the stockholders to establish their debts against the corporation with the view of reaching the whole unpaid subscriptions in the hands of the stockholders, the Virginia decree against the corporation would be binding upon the stockholders. The stockholders compose the corporation and are represented by it, and are of necessity bound by the proceedings to which it is a party in any court of competent jurisdiction in which the corporation has been duly served with process. This is elementary law and need not be here further considered. But in a subsequent part of this argument on the subject of necessary parties to the chancery suit in Richmond, the position will be fully illustrated and enforced.

2. A further answer to the pleas is that the debts due by the corporation are due by it in Virginia, where it was chartered and where alone is its domicil and legal existence, and are properly enforceable by the laws of Virginia, and that it is well settled by the laws of Virginia that in the case of a claim secured by a mortgage although the remedy by an action at law for the claim may be barred by the Statute of Limitations, the remedy under the mortgage will not be affected by any lapse of time short of the period sufficient to raise the presumption of payment. *Smith* vs. *Washington City &c. R. R. Co.*, 33 Grat. 617. That was a case like the present in which a corporation had given a deed of trust on its property to secure certain indebtedness, and a simple contract debt, which in an action at law would have been barred in five years, was held to be a valid claim against the trust fund many years after that bar would have applied. See particularly 619–621 where many authorities are collected. Accordingly the Chancery Court of the City of Richmond was clearly right in holding that the debts of this corporation were valid as to the trust fund conveyed by the said corporation in the said deed of trust for their payment, and if the corporation had appeared and pleaded limitations, the result must obviously have been the same.

3. But a complete and conclusive answer to the pleas is, that this is not an action by the creditors to establish their debts, but an action by the trustee in the deed of trust to recover a debt which is due to him under the terms of the said deed; and that a court of competent jurisdiction in the State, where the deed was made and has been

construed, has judicially ascertained that it was necessary and proper that a certain portion of the debts due to the corporation should be collected under the terms of the deed authorizing and empowering the trustee to make such collection; and that neither the regularity nor the propriety of the proceedings in that suit can be made the subject of inquiry in this collateral action. The president and board of directors constituted the proper body to make the call and assessment upon the unpaid subscriptions; and a call made by them would be conclusive against the stockholders by the very terms of the charter of the corporation as well as by the general principles of law. The learned Chancery Court of Richmond only performed the duty which the official body had failed to perform; and the call and assessment having thus been made by competent authority, is binding and conclusive upon the stockholders everywhere in respect alike to the necessity and the amount of the call. This position also will be hereinafter enforced and illustrated. It is sufficient here to refer to the case of *Hall* vs, *U. S. Ins. Co.*, 5 Gill, p. 484, as containing as well the principles as a striking example of the rule followed by the Chancery Court. Upon the whole it is submitted to be clear that the demurrers to plea No. 5 and to plea No. 6 should have been sustained.

II. The next plea which we shall notice is plea No. 4 which is that the alleged cause of action did not accrue within three years befor the institution of this suit, which plea the plaintiff traversed; and in this connection it will be convenient also to consider plea No. 7, which seems to be the same in substance as plea No. 4, to which plea No. 7, plaintiff demurred. The same question is thus presented in two ways.

This question depends upon the terms of the charter of the company by which the rights and obligations of the contracts of subscription to the capital stock are determined. In Virginia there are general statutes touching private corporations and chartered companies, subject to which all charters are granted. Code of 1873, ch. 56 and ch. 57. By § 2, of ch. 57, it is provided that "upon every subscription for shares in a joint stock company," like the present, "there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors;" and it is provided that the sums payable at the time of subscription shall be paid to commissioners authorized under the statute. By § 22 the two dollars per share collected by commissioners at the time of receiving the sub-

scription are directed to be paid to such persons as the president and directors may require, and in case of failure so to pay, the company may recover the same against the commissioners by warrant, action or motion in lieu of an action. By § 23 it is provided, "that if the money which any stockholder has to pay upon his shares, be not paid, as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action or motion as aforesaid; or such shares may, after notice in a newspaper for one month of the time and place of sale, be sold at public auction for ready money, and transferred to the purchaser;" and by § 26 it is provided, that "no stock shall be assigned on the books without consent of the company, until all the money which has become payable thereon shall have been paid; and on any assignment the assignee and assignor shall each be liable for any instalments which may have or which may thereafter accrue, and may be proceeded against in the manner before provided."

From these provisions it appears that the only money which the stockholder is required to pay at the time of subscribing is two dollars per share of his subscription, and that he is liable to pay the balance ($98 on each share) only as he may be required by the president and directors; that is to say, at such time or times and in such instalments and at such places as may be determined by the officers of the corporation just named. And it is clear, that until a call or requirement is made by the president and directors, there is no more liability on his part to be sued for his unpaid subscriptions than there is a liability on his part to a sale of his stock, or right on the part of the president and directors or the company to make a sale of his stock before such call is made. There is no default on his part until he has been called upon to pay and has failed or refused. It is only upon the concurrence of these two things; (1) a requirement by the president and directors to pay an instalment, and (2) failure on his part to pay the sum required at the time and place required, that any liability to suit or right of action or remedy is given for the deferred portion of the subscription. *Banet* vs. *The Alton &c, R. R. Co.*, 13 Ill., 404, 513, 514; *Spangler* vs. *Ind. & Ill. R. R. Co.*, 21 Ill, 276; *Devendorf* vs. *Beardsley*, 23 Barb., 656; Morawetz on Private Corporations, § 281. Such terms of credit and the contingency of never being called upon to pay the larger part of his subscription at all (which may well be the case if prosperity attend the enterprise) obviously enter into consideration and constitute important elements in the inducement to make

the subscription, and a company is thus enabled, upon a small advance of ready capital, to get subscribers and commence business, while the public is induced to give credit to the concern upon the faith of those subscriptions and the liability of calls for them at any time they may be needed to pay debts contracted by the concern.

It is next to be observed that this power to call in these deferred instalments is vested by the statute not in the company, but in the president and directors, the official agents of the company. And this distinction is important to be taken and remembered. For such power, being in its nature a trust to be exercised for the benefit alike of the stockholders and creditors of the company, and indeed for all the purposes of carrying on the business of the corporation, and requiring in its exercise judgment and discretion, cannot be delegated, and being an express statutory power, it is not merely an incident of the official agency composed of the president and directors, but constitutes a substantive and integral part of official functions and duties; a power, indeed, essential to the objects of corporation, the successful operation of its business and the ends of justice in the payment of its debts. It is the fundamental moving power of the machine, the power of supplying fuel to the engine, and must co-exist with the existence of the collective office of the corporate administration until the power exhausts itself by complete execution, and there remains nothing of the reserved fund upon which it is to operate.

That this statutory power, in the nature of a trust, thus conferred upon a selected body of governing agents, cannot be exercised except by that body itself, and cannot be parted with or delegated is well established. Angell and Ames on Corporations, sec. 279; *Silver Hook Road* vs. *Ray Greene*, 12 R. I., pp. 164–165 (1880); *Tanner's Mut. Ins. Co.* vs. *Chase*, 56 N. Hamp. (1877), pp. 345-6, and numerous cases there cited; and *Pike* vs. *Shore Line*, 68 Maine, 445 (1879) and see Morawetz on Private Corp., sec. 281 and notes 1 and 2.

This power, as the record shows, was exercised four times by the president and directors of the company, a call being made at each time for an instalment of five per cent. of the unpaid subscriptions. Had these calls been promptly paid, it is probable that the company might have overcome its financial embarassments, and no further calls might have become necessary, but, in point of fact, they were not paid, except partially, and in point of fact also, the company being embarassed, executed, as we have seen, on the 20th of September, 1866, a

general deed of assignment to trustees of all of its property rights and credits in trust for the payment of all of its debts. This deed was construed by the Chancery Court of the city of Richmond, and held to convey to the trustees the right to receive all of the uncalled for and unpaid subscriptions, as well as those which had been called for previously to the execution of the deed, and which had not been paid. The deed, however, as that court very properly held, did not pass or convey the power to call for the eighty per cent. of subscriptions, for which no call had been made. The company itself, it has been shown, had no power to make such a call, that power being vested exclusively in the president and board of directors by the statute, and of course if the company had no such power it could convey none by its deed. The president and directors were not parties to the deed, and if they had been, and had attempted to delegate or part with the power exclusively vested in them, the attempt would have been *ultra vires* and void, as has been shown.

The right, therefore, to receive this eighty per cent. of uncalled for subscriptions was vested by the deed in the trustees, but the power to make calls or assessments upon those subscriptions remained in the official governing body of the corporation, where it had been reposed by the statute.

The leading and ultimate object of the creditors' bill in the Chancery Court of Richmond, was to obtain a call or assessment upon these unpaid subscriptions for the payment of the debts of the company. Under the decisions of the Virginia Supreme Court of Appeals, as we have already seen, if a debt is secured by a deed of trust on the property of the grantor, whether the debt be evidenced by bond, note or open account, it is not barred so far as the trust fund is concerned by any statute of limitations, and remains a valid obligation of the grantor until presumption of payment arises from lapse of time, which in Virginia is twenty years. *Smith* vs. *Wash. &c. R. R. Co.*, 33 Grat. 617, and in the still later case of *Bowie* vs. *Poor School Society, &c.*, Va. L. J. for 1881, p. 313, 75 Va. R. 300 (1882), the court affirming this case added: "And this is true although the deed contain no express promise to pay the debt, and although the debt is not evidenced by any bond or other instrument under seal." See also *Edwards* vs. *Walton*, L. R., 1 app. cases (H. L.) 281 (1875).

The debts secured by this deed were, therefore, as binding upon the fund as they ever were, and they were so held by the Chancery Court

of the city of Richmond: and that court having ascertained the debts of the company secured by the deed, proceeded to levy and make an assessment of thirty per cent. upon the subscriptions and directed the trustee substituted in the place of the original trustees, to collect the money by suit or otherwise as provided by the trusts of the deed. The contention now is that the obligation of the stockholders to pay the eighty per cent. of their unpaid subscriptions or any part thereof is barred by the ordinary statute of limitations touching debts not under seal.

The plea, however, obviously overlooks the terms and nature of the contract made by the stockholders. That contract the terms of which are fixed by the statute under which the charter of the company was granted, created no liability to pay on the part of the stockholders until an instalment beyond the first payment of two dollars per share should be called for by the president and directors. Until such instalment was called for by the very terms of his contract, the stockholder was not liable to make further payment. Indeed, until such call was made, he could never know how much he was required to pay, or when and where or to whom he was required to pay it. And nothing would seem clearer or more obvious than that an action at law by the company, or by any other party could not be maintained before and until a call for a designated instalment should be made by competent authority. Until such event or contingency no cause of action could arise against the stockholders, and it is elementary law that the statute of limitations never commences to run until after a cause of action has arisen. Angell on Lim., § 42.

It has, therefore, been uniformly held that where a debt is payable by instalments no action arises until the event or contingency has happened upon which the instalment becomes due, and that the statute of limitations does not, until the happening of such occurrence, commence to run. "The time of limitation," says Addison, begins to run from the period of the breach of contract and the accrual of the cause of action, and not from the time of the making of the contract. If, therefore, a thing is to be done on the happening of a contingent or uncertain event there can be no cause of action and no limitation of time until the event has happened."

And again, "whenever the liability of the defendant is dependent, upon some contingency, or the happening of some uncertain event the cause of action does not arise until the contingency has happened."

1 Addison on Contracts (Am. Ed., by Morgan, of 1875), §§ 406, 407

Thus also says Parsons, "If money be payable by instalments the statute begins to run, as to each instalment, from the time when it becomes due." 3 Pars. Cont., p. 93; and to the same effect see 2 Story, Cont., § 1011 (*a*) and 2 Chitty Cont., p. 1229 and p. 123; and see *Hemp* vs. *Garland*, 45 E. C. L. (4 Ad. & El. N. S.), 519; and *Miles* vs. *Baugh*, 43 E. C. L. (3 Ad. & El. N. S.), 1001.

These principles have been uniformly applied in England and in this country to calls for instalments on unpaid subscriptions to the capital stock of incorporated companies whenever the question of limitations has arisen. In *Turquand* vs. *Kirby*, L. R., 4 Eq., 123, which was a suit by the official liquidator of the Leeds Banking Company against the devisees of a deceased shareholder, to the plea of limitations, Lord Romilly said (p. 127): "I am unable to draw any line at which time should operate so as to bar the claim of the company. It is clear that the statute of limitations has nothing to do with the case; for the debt did not exist until the call was made.

In this country the learned Court of Appeals of Maryland was a pioneer in holding the same view, and its decision has been made the basis of accepted law by commentators of high authority.

In Angell on Limitations, § 110 (Ed., 1876), it is stated that "when debt is payable at several times, that is by instalment, the time begins to run from the expiration of the first term, for the part then payable; and for the other parts only from the day of expiration of the respective terms of payment. Thus, under an act of the Legislature of Maryland incorporating a turnpike company, the shares subscribed for were to be paid in instalments at different times, and it was held that the statute of limitations attached to each one as it became due," citing *Balto. Turn. Co.* vs. *Barnes*, 6 Harr. & J. (Md.), 57.

The learned author might with great propriety have cited the more recent case of *Taggart* vs. *West. Md. R. R. Co.*, 24 Md., p. 564, in which the Court of Appeals of Maryland referred to and affirmed the case in 6 Harr. & J., and held that the statute of limitation does not begin to run until the several calls are made for the instalments of unpaid subscriptions.

These decisions would seem to be conclusive of the question at issue; but as the learned Circuit Court of Baltimore has held otherwise, and is reported to have held that the preponderance of current decisions is the other way, and as the point is one of vital importance

to the appellant in this and other jurisdictions, it may be pardoned to examine the cases, and it is respectfully submitted that a careful examination of the cases will discover that there is no foundation for the suggestion indicated, and that on the contrary, all of the decisions of the several States and of the Supreme Court of the United States touching the subject are in full accordance with and affirmance of the leading case of *Baltimore Turnpike Co.* vs. *Barnes*, 6 Harr. & J. (Md.), 87, approved and followed by the learned Court of Appeals of Maryland so recently in *Taggart* vs. *West. Md. R. R. Co.*, 24 Md., 597, as above shown.

North Carolina.—In a case decided in 1870, in a suit for instalments for which calls had been made, and to which the plea of limitations was interposed, the Supreme Court of North Carolina said "The statute of limitations commenced to run on each instalment from the day upon which the call for its payment was made. When the defendant became a stockholder he agreed to pay such instalments as the board of directors might from time to time call for, and when he failed to do so he at once became liable to an action of assumpsit. for such instalments as had been demanded and where then due. Of course then, the statute commenced to run when the cause of action accrued, to-wit; as to each instalment when it became due by the call of the company, 3 Pars. Cont., 93. If a bill or note be payable by instalments, the statute begins to run from the date of each instalment respectively. *Gray* vs. *Pinder*, 2 B. & P., 427." *Western R. R. Co.*, vs *Avery*, 64 N. C., p. 491.

Connecticut.—The members of the Hope Insurance Company, in order to create an insurance fund, gave notes as follows:

"NEW YORK, May 1, 1847.

"Twelve months after date, or sooner if required, I promise to pay to the Hope Ins. Co., or order $2,500, or such assessment of the same as the trustees find necessary to impose for the purpose of paying losses, agreeably to the terms of my subscription to the guaranty fund of said company, for value received."

The company issued numerous policies to persons who took them in reliance upon the security of this fund. The company afterwards failed, and a receiver was appointed. All its assets were exhausted and a large amount of losses remained unpaid. The trustees thereupon (22d May, 1854) made an assessment in regular form of seventy-five per cent. on the notes. In a suit brought by the receiver for the

recovery of the amount assessed upon one of these notes, it was *held:* "That no cause of action accrued upon the note until the assessment and demand, and consequently the statute of limitation did not begin to run until then." *Hope Mut. Ins. Co.* vs. *Weed*, 28 Conn. 51, 68.

Indiana.—A subscription of stock to a railroad company contained a provision that the stock subscribed should be paid in cash at such times and places as should thereafter be directed by the directors of the company, and should be applied to the construction of the road. *Held:* That the subscription would not become payable until the directors, at a regular meeting, had fixed the time and place of payment. *Ross* vs. *Lafayette, &c., R. R. Co.*, 6 Ind., 297, and see to same effect *Breedlove* vs. *Martinsville, &c., R. R. Co.*, 12 Ind., 114; *Gebhart* vs. *Junction R. R. Co.*, 12 Ind., 484, 485.

New York.—A premium note of a mutual insurance company "was by its terms payable in such portions and at such time or times as the directors might, agreeably to their charter and by-laws, require." *Held:*

"1. *An assessment* is *a necessary condition to the maintenance of an action by the receiver of the company on the note.*

"2. *The insolvency of the company does not enable the receiver to recover under circumstances in which the company could not have maintained a suit*, nor to a *greater amount.*"

Savage, receiver, vs. *Medbury*, 19 N. Y., 32; and see cases cited, p. 36; and to same effect see *Sands* vs. *St. Johns*, 36 Barb., 635, where *Savage, &c.* vs. *Medbury* is cited and followed, and see also to same effect *Howland* vs. *Cuykendall*, 40 Barb., 320; *Sands, receiver*, vs. *Annesly*, 56 Barb., 598; *Sands, receiver*, vs. *Lilienthal et als*, 46 N. Y., 541; *Sapoy* vs. *Dubois*, 3. Sand. Ch., 486.

Iowa.—On the note of a stockholder which promised to pay to the company "$350 in such portions and at such times as the directors of said company may, agreeably to the charter and by-laws, require, not exceeding seven per cent. per year," it was *held* "That to justify a recovery the requirement of the payment by the board of directors should be shown in evidence." *Warner* vs. *Beem*, 36 Iowa Rep., 386. (And in this case the court said: "The cases of *White* vs. *Haight*, 16 N. Y. 310, and *Howland* vs. *Edmund*, 24 N. Y., 307, are unlike this case, because in those cases given to make up the capital stock, such notes were by the *fifth section of the charter of the companies* made *payable absolutely*, not-

withstanding their language." These two New York cases, it may be added, are distinguished by this circumstance from the New York cases above cited, and therefore do not touch or affect the authority of those cases.)

In *Chandler* vs. *Keith*, 42 Iowa, 99, 102, 103, the court held even in a collateral proceeding that where a receiver, without an assessment having been made, was authorized by a decree to bring suit for the whole of the eighty per cent unpaid subscriptions, and had brought suit for the whole amount, the suit could not be maintained, because an assessment had not been made. The contract was to pay twenty per cent. absolutely, and "the balance should be subject to the call of the directors as they may be instructed by the majority of the stockholders."

The court said:

"The defendant can be required to pay the unpaid balance of his stock only in conformity to his contract. He agreed to pay as called upon to do so by the directors as they should be instructed by the majority of the stockholders present. The court (which appointed the receiver and directed him to bring suit), in the event of insolvency and the neglect and refusal of the directors and stockholders to act in the premises, can do no more, has no greater authority to compel payment of this eighty per cent unpaid upon the shares of the stockholders than had the directors; and before the defendant can be required to pay more than the twenty per cent. specified in his obligation, call must be made upon the stockholders for the amount assessed upon the shares held by them respectively."

Circuit Court U. S. for Eighth District, Mr. Justice Miller and Circuit Judge Dillon. In full accord with the foregoing decision of the Supreme Court of Iowa, in *Chandler* vs. *Keith*, is that in *Chandler* vs. *Siddler*, 3 Dillon's C. C. R. (1874) p. 477, in which the court said by Mr. Justice Miller: "I am of opinion, considering the terms of the contract and that no call or assessment is alleged, either by the company before the insolvency or by the court since, that the petition does not state a cause of action. In other words, in this action at law on the contract, there must be a call or assessment, or something standing in the place thereof and the equivalent thereto, either by the company or by a proper court, in order to make the defendant liable.' The distinguished Circuit Judge Dillon who reported the case concurred.

Ohio—The subscribers to the stock of an insurance company gave to the corporation their secured promissory notes, payable on demand for the amount of the stock by them respectively subscribed. *Held*, that the notes must be construed in connection with the business of the corporation and in view of the object intended by the parties in giving their notes. Thus construed, the notes were intended to be payable on the call of the directors and the statute of limitations is no more available as a defence against the collection of the notes, than it would have been against the collection of the subscription, and the plea was overruled. *Kilbrath* vs. *Gaylord*, 34 Ohio St., (1877) 305, 309.

In *Gibson* vs. *Columbia & N. Richmond T. & Bridge Co.*, 18 Ohio St. 396, subscription was made to capital stock in 1849. No call was made upon the unpaid subscriptions until 1861. The terms were five per cent. on subscribing and balance on instalments of ten per cent., a period of sixty days to intervene between each call. (See Acts 1817, p. 60, and Acts 1849, p. 325). Suit was not brought for the unpaid subscriptions until 1865. *Held:* "the company's right of action is not barred by the statute of limitations. It did not accrue until a call was made in January, 1861, for the payment of the subscriptions, and being a promise in writing, the limitation is fifteen years."

Massachusetts.—"The right to assess was not absolute. It was expressly made contingent on the condition and state of the business of the corporation and was to be exercised only, both as to the time of assessment and the amount to be paid by the directors of the corporation, according to their judgment and discretion." *Pendergast* vs. *Com. Mut. Ins. Co.*, 15 Gray, 260. But here is a direct and emphatic case, expressly in point, in which the judgment of the Supreme Judicial Court of Massachusetts was delivered by one of the most distinguished jurists of the country. Defendant gave a note as follows:

"BOSTON, September 12, 1866.

"In consideration of policy No. 18,539 of even date herewith issued by the Union M. F. Co., I promise to pay to said Co., or to the treasurer thereof, the sum of $74.25, or any part thereof when required, with interest from the first instant till paid in full, this note being part of the absolute funds of said company."

The writ was dated November 6, 1873, and was to recover an official assessment made on the 14th November, 1872. Plea, the statute of limitations. *Putnam, J.*, in the court below overruled the plea and gave judgment for the receivers of the company. On appeal, the judgment of the Supreme Judicial Court was delivered by *Gray, J.*, (the present Mr. Justice Gray of the Supreme Court of the United States), as follows: "The note in suit is not of the nature of a common promissory note payable on demand, upon which the bringing of an action would be a sufficient demand, and the cause of action would accrue as soon as the note was made. It is a deposit note, by which the maker, in consideration of a policy of insurance issued to him, promised to pay to the insurance company or its treasurer the whole or any part of the note required; the defendant was not bound to pay any part of the note until the company required him and other makers of similar notes to do so, and the statute of limitations did not begin to run before the laying of an assessment. *Long Pond Ins. Co.* vs. *Houghton*, 6 Gray; *Appleton Ins. Co.* vs. *Jesser*, 5 Allen." *Bigelow* vs. *Libby*, 117 Mass. (1875), 359.

Pennsylvania.—The contract was to pay the subscription "in such manner, at such times, and in such proportions as shall be determined by the president and managers of the company:" The Supreme Court of Pennsylvania held, "According to the express provisions of the 8th section of the act, no action could have been maintained for the defendants' subscription or any part of it until the managers had fixed a time for the payment of it and given notice as directed by the act. * * * The rule on the subject is, that the statute of limitations does not begin to run before the plaintiff has a right to bring his suit." *Sinkler* vs. *The Turnpike Company*, 3 Penrose & Watts, p. 149, p. 156.

The 9th section of the General Manufacturing Law of Pennsylvania provides: "That all the stockholders of any company incorporated under the provisions of this act shall be jointly and severally liable in their individual capacities for all debts and contracts made by such company to the amount remaining unpaid on the shares of stock by them respectively held, until the whole amount of the capital stock, as fixed and limited by the said company, as in this act provided, shall have been paid in, and a certificate thereof shall have been made and recorded, as prescribed in the following section."

The Conestoga Steam Mills Company was organized and went into operations under this law. An assessment was not made until eleven years afterwards, and upon suit brought by creditors against the company and the stockholders, the six years statute of limitations was pleaded. *Held:* "That the defendants (stockholders) could not plead the statute of limitations against the plaintffs or against the company for calls upon the unpaid stock, though it had not been called in for eleven years; for the subscriptions unpaid were not only held in reserve to be drawn as needed, but the statute declares the continuing liability of the stockholders until the whole amount of the capital stock shall have been paid." *Allebone* vs. *Hager*, 46 Penn. St, 48, 54.

The legal effect of the Virginia statute is the same; for payment is not to be made until called for by the president and board of directors, and then an action is given for the installments called for, and if the stock be transferred, alike the subscriber and assignee are made liable for all instalments unpaid. Code of 1873, ch. 157, sec. 3, sec. 23, sec. 26.

In *McCully* vs. *Pittsburg, &c., R. R. Co.*, 32 Penn. St. (8 Casey), 25; *Byers* vs. *same*, Id., 22, and *Pittsburg, &c., R. R. Co.* vs. *Graham*, 36 Penn. St. (12 Casey), 77, the Supreme Court of Pennsylvania had held that where the corporation had not prosecuted its work according to the requirements of the statute, and had not in fact commenced its business and no calls were made within six years from the date of the subscription for the payments on account of stock, a presumption of abandonment of the project arose in favor of the subscriber, and that six years was a bar to the remedy by call, and to a suit to recover the instalments so called for. In those cases the act of incorporation provided that if the company did not *commence* the construction of their road within the term of five years the charter should be void, and it was held that under the circumstances of the case, the project was abandoned. In *McCully* vs. *P. &c., R. R. Co.*, 32 Penn. St., (*supra*) 31, the court say: "Not only was the project abandoned, but the money of many of the subscribers was refunded to them, and they released from all further obligations to the company." The statute of limitation was therefore held to apply. In *Allebone* vs. *Hager*, 46 Penn. St., 48, 54, the court distinguished the cases stated *supra* from that case in which the company had regularly commenced and had car-

ried on its business for years, but for eleven years had not made a call for an instalment of the subscription, and held that limitations did not bar the claim either of the company or its creditors, and that the liability of the stockholder was continuous until the whole amount of the capital stock should have been paid in.

It cannot fail to be remarked that this case (decided in 1863) is in full accordance with the above cited case of *Sinkler* vs. *The Turnpike Co.*, 3 Pen. & Watts, 169, decided in 1831, and also with the principles of *Bush* vs. *Stowell et al*, 71 Penn. St., 208, decided in 1872, in which it was held that "In assumpsit on a note payable in instalments, an action may be maintained on each instalment as it becomes due; the statute, therefore began to run as soon as such instalment became due."

Supreme Court of the United States.—Where the mortgage is payable by instalments, some of which were not due at the filing of the bill, the statute of limitation does not apply. *Union Bank* vs. *Stafford & als.*, 12 How., 328.

Maine.—On a note "payable in three yearly equal payments," the cause of action accrues for the first payment so soon as it becomes payable, and the statute of limitations begins to run from that time, not from the time when the latest sum should be paid. *Burnham* vs. *Brown*, 23 Maine, 400.

Arkansas.—The charter prescribed that "payment of the shares of the capital stock of the company should be made in such sums and at such periods as shall be fixed by the board of directors: Provided, that at least sixty days' notice shall be given of such call published in at least two newspapers of South Arkansas and one in the city of Little Rock:" *Held*, that not only the making an assessment but the notice thus prescribed is a condition precedent to the right of action of the company; and a suit to recover the amount of the assessments if instituted before the defendant has had sixty days' notice would be prematurely brought and could not be maintained. *Miss. &c. R. R. Co.* vs. *Gaster*, 20 Ark. 455.

Tennessee.—Unauthorized notes were taken for subscriptions to stock. The notes were barred by limitation; yet in a suit against the stockholders for the unpaid subscriptions, it was held that, "until the stock subscribed had been actually paid up, it will be considered as a debt subsisting independently of the notes executed in payment thereof, as to which the statute of limitations begins to run from the

time a call is made for the payment of the stock." *Moses adm'r et als. Ocoee Bank*, Tenn. 398, decided in 1878.

Georgia.—Right of action did not accrue until a call was made. *Macon & Augusta R. R. Co.* vs. *Vason et als.*, 52 Ga. 326.

By the charter of the Manufacturers' Bank, it was provided that the directors should call in "from time to time such instalments on the capital stock, as to the directors might seem advisable, until the whole amount should be paid in; but no instalment could be required without giving sixty days' notice thereof by letters addressed to the stockholders, or by publication in the gazettes of the city where the bank was located."

The bank suspended payment in 1860, and since the first of May, 1865, transacted no business, and kept no banking house or office and was insolvent. The directors failed and refused to make any calls on the stockholders. The complainants obtained judgments against the bank in 1872, 1873 and 1874, in suits commenced in 1869, and the bank having no property, the sheriff returned "*nulla bona*" upon *fi. fas.*, some of the returns being dated in 1875, and some in 1876. The complainants then filed a bill against certain stockholders to subject to the payment of these judgments certain unpaid stock subscribed by the stockholders. *Held:*

"When the charter of a corporation as a condition precedent to collecting subscriptions to capital stock requires calls to be made by the directors and notice thereof given, the statute of limitations does not run against the corporation, in favor of the subscribers, as to unpaid subscriptions until the condition be complied with." *Cherry et al.* vs. *Lamar et al.* 58 Ga. 541, 542, 543, citing and affirming *Macon, &c. R.* vs. *Vason*, 52 Ga. 826, *supra*. And in *Hightower* vs. *Thornton, et al.* 8 Ga. 502–3, the same court had held upon a different and distinct ground—namely, that of express trusts—that the statute of limitations does not run against unpaid subscriptions.

Louisiana.—Here is a case in its main aspects essentially resembling the case at bar, and deserves to be specially observed. There was a mortgage of unpaid subscriptions to pay the debts of the corporation. It appeared that the defendent stockholders "were not obliged to pay until a *requisition* was made upon them for the whole or any part of the amount" claimed, and that the "mortgage left to the discretion of the board of directors of the company the epoch at which they should exact payment." The court held that the "debt was not

demandable until the board of directors should determine that it ought to be demanded." The company was chartered and organized in 1833. The mortgage was made some time thereafter. The company forfeited its charter and was put into liquidation as an insolvent corporation, and commissioners were duly appointed under an act of the Legislature of 1842, to execute the liquidation. They seem to have failed in their duty, and by an act of the Legislature of 1850 it was made the express duty of a liquidator "to collect the assets of the company, including the subscriptions of the shareholders, by a suit or otherwise, as speedily as possible." No call or demand was made for the unpaid subscriptions until the 11th of September, 1852, ten years after the notorious insolvency of the company and the forfeiture of its charter. Upon suit brought by the liquidator for the unpaid subscriptions the bar of "prescription" (or limitation) was pleaded, and it was contended by the defendants "that all the obligations of the company became due as soon as it was declared to be insolvent in 1842, and that it was the duty of the creditors of the company to have forced by process of law the administration of the company to make the necessary calls upon shareholders for contribution, and to enforce their collection." But the learned court held that "as no period was fixed for the payment of the stock of defendants, except that which should be designated by the administration of the company, and as ten years had not expired from the time when the payment of the stock *was demanded*, which might be considered the *time fixed for the payment of the stock*, it is clear that prescription had not accrued in favor of the defendants against the claim of the company for the payment of their stock." *Liquidator of Clinton and P. H. R. R. Co.* vs. *Eason and wife*, 14 La. Ann., pp. 816, 817, 818, 819, 820 (1859). It would seem to be impossible to distinguish this case from the case at bar. Here was a mortgage of unpaid subscriptions to pay the debts of an embarassed company, and long after limitations would have applied to an ordinary claim for money payable on demand, it was held that as no period was fixed for the payment of the subscriptions except as they should be called for by the competent authority, and as no call was made until a time within the limit of prescription, the official liquidator was entitled to recover the unpaid subscriptions to be applied in payment of the debts of the company secured by the mortgage.

We have thus gone through all of the known cases. Singularly

enough, few of them are to be found cited in any treatise on the laws of Corporations, Stockholders or Limitations, probably for the reason, as it would seem (as in Morawetz on Private Corporations, § 281), that the point was deemed too clear for discussion.

Diligent search has failed to discover any adjudicated case either in England or America adverse to these uniform decisions. If there be any, let them be produced. One or two suggestions or *dicta* have been loosely thrown out to the effect that the statute begins to run from the time the corporation ceases to elect a directory or discontinues its business. But in no instance has the point been asserted in a case necessary for its adjudication, or even its consideration.

The only two known cases in which such a suggestion has been made are *Payne* vs. *Bullard*, 23 Miss., 91, and *Curry* vs. *Woodward*, 53 Ala., 376. In *Payne* vs. *Bullard* the point did not arise, and the court merely said, that from the time the bank ceased to elect a directory or to carry on its business, it might, "*perhaps*, be held that there was a cessation of the trust, and that the statute might then begin to run. But on this point, we give no authoritative opinion, because it is clear that six years did not elapse from that period until the filing of this bill." And so in the other case of *Curry* vs. *Woodward*, 53 Ala., p 376, although the court (referring to *Payne* vs. *Bullard* as its only authority,) said that "until the call was made, or there was an evident abandonment of the company and relinquishment of its business, the statute does not begin to run,"—which would seem to place a call and an abandonment and relinquishment of the business upon the same footing, yet the court immediately added in the next sentence, "And it is clear from the answer that the company did not discontinue business long enough before the garnishment in this cause was served to enable the statute of limitations to be effectually pleaded in bar of a recovery"—p. 376. It is, therefore, entirely obvious that what the court said in respect to the abandonment of the company and the relinquishment of the business was *obiter dictum*, and as the point does not appear to have been argued, the suggestion is entitled to no consideration.

In point of fact, alike the Supreme Court of Mississippi and the Supreme Court of Alabama have fully recognized and adjudicated principles which are at war with the idea that after a corporation has contracted debts and become insolvent and disorganized and thus the rights of the creditors have attached to its assets as a trust

fund primarily liable for the payment of the corprate debts (and especially when such creditors have acquired either by the voluntary assignment of the corporation, or by judgment and execution, a *lien* upon those assets), it is in the power of the corporation, or of its stockholders, either by any act done or failed to be done, to disturb the vested rights of the creditors thus established. Thus, in *Payne* vs. *Bullard*, 23 Miss., 90, the court says: "The decisions of this court hold the stock subscribed to a bank to be in the nature of a trust fund for the payment of its liabilities. *King* vs. *Elliott*, 5 S. & M., 447; *Arthur* vs *C. & R. R. Bank of Vicksburg*, 9 Ib., 430. This trust fund is usually administered by the directory, as the agent of the stockholders; and after payment of the stock the directory is alone looked to for its faithful management. But before its payment the stockholders themselves are chargeable with the trust in favor of the creditors of the bank. The stock is the fund which the creditors trust. They have no direct means of compelling its payment until they have obtained judgments at law, They become the beneficiaries of the trust by receiving the notes, and the stockholders, as the persons bound by the trust, cannot oppose the statute of limitations to their claim to have the stock paid up. If the corporation does not compel payment of the stock the subscribers must be deemed to hold it for the corporation subject to its call. It is a continuing subsisting trust and confidence to which the statute of limitations has no application."

The same principles are affirmed in *Smith* vs. *Huckabee*, 53 Ala., and in *Curry* vs. *Woodward*, Id., 375–378. And obviously the embarrassment, disorganization, or even dissolution of a corporation, cannot alter the terms of the contracts which have been made with it or made by it any more than the illness or death of an individual can alter the terms of a contract made by or with him. 2 Story's Equity Jurisp., § 1272. Thus in *Mumma* vs. *The Potomac Co.*, 8 Pet., 281, the Supreme Court of the United States said (Mr. Justice Story delivering its judgment): "We are of opinion that the dissolution of the corporation * * cannot in any just sense be considered * * an imparing of the obligation of the contracts of the company * * any more than the death of a private person can be said to impair the obligation of his contracts. The obligation of those contracts survives, and the creditors may enforce their claims against any property belonging to the corpora-

tion which has not passed into the hands of *bona fide* purchasers, but is still held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws."

In *Curran* v. *State of Arkansas*, 15 Howard, 304, this language is quoted and approved; and it was further held that a State law which deprives creditors of this right, and appropriates the property to other uses, impairs the obligation of the contract made by the corporation with its creditors, as protected by the Constitution of the United States, and is invalid and void; and that "if the charter of a corporation sets apart a fund as capital, out of which debts are to be paid, it amounts to a contract with those who become creditors on the faith of it, that the fund shall not be withdrawn and appropriated to the use of the owner or owners of the capital stock;" and both of these cases are cited and approved in *Bacon* vs. *Robertson*, 18 How. 486. In this last case the old doctrine of the common law as to the effect of the dissolution of a corporation upon its contracts and property is shown not to be the rule in equity either in England or America; and though after dissolution, technically, the corporation has no existance, its property remains a trust fund primarily for its creditors, and, secondarily, for its stockholders. It had previously been held by the Supreme Court (Chief Justice Marshall delivering its opinion) in *Lennox* vs. *Roberts*, 2 Wheat. 373, that though after the dissolution of the Bank of the United States no suit could be brought by the bank upon contracts which had been made with it, yet that the trustee in an assignment made by the bank before its dissolution was entitled to sue all parties to such contracts upon their obligations to the bank for the payment of its debts to its creditors; and this case was also quoted and approved in *Curran* vs. *Arkansas*, 15 How. 305, and *Macon* vs. *Robertson*, 18 How. 480, *supra;* and without reference to the decision of the Supreme Court in *Lennox* vs. *Roberts*, the Court of Appeals of Virginia affirmed the same doctrine in *Bank* vs. *Patton*, 1 Rob. (Va.) R. 528, and in *May* vs. *State Bank*, 2 Rob. 56.

And while on the one hand we have seen in *Turquand* vs. *Kirby*, L. R. 4 Eq. (1864), 123, that nine years after the death of a shareholder, his real estate in the hands of devisees was subjected to the payment of a call recently levied, and the statute of limitations was held to have nothing to do with the case because no

action arose until the call was made, on the other hand we have seen in the case of *Liquidator, &c.*, vs. *Eason & wife*, 14 La. Ann. (1859) 816, that the wrecked condition of the corporation had no effect whatever on the liability of the shareholders upon their contracts of subscription and that twenty years after the subscriptions had been made and ten years after the insolvency, abandonment of its business and dissolution of the corporation, and after its affairs had been placed in the hands of statutory commissioners for settlement, an assessment levied by the official liquidator was held to be valid and binding upon the subscriptions and unaffected by prescription, or the statute of limitations, which was held to run only from the time the assessment was made.

There is indeed a class of cases in which upon the insolvency and disorganization of a company, the statute of limitations begins to run as to certain claims against its stockholders. It is perhaps to a failure to observe the broad and radical distinction between those cases and the cases of the kind at bar, that the confusion of superficial ideas sometimes existing upon the general subject may in part be attributed. Where the charter of a corporation provides that upon its insolvency its stockholders shall be liable for its debts, this is a special statutory, individual liability of an extraordinary character, but to be enforced, like every other contract, according to its terms, and a cause of action arises in favor of the creditors against the stockholders upon the established insolvency and disorganization of the corporation, and limitation begins to run from the date of such event. *Terry* vs. *Tubman*, 92 U. S. R. 156, and *Terry* vs. *Anderson*, 95 U. S. R. 628, are examples. But that class of cases has nothing to do with the present kind (which stands upon a contract of a different nature, and with different terms,) except as an illustration that the statute begins to run only from the time that a right of action accrues, which is a proposition of acknowledged law. Upon contracts of subscription to the capital stock, to be paid as called for by the official agency of the corporation, no cause of action can arise upon the contract until a call is made. This distinction between the two classes of contract is clearly recognized by Mr. Chief Justice Waite, and the whole court in *Terry* vs. *Anderson*, 95 U. S. R. (*supra*) p. 635, 636.

In speaking of the case of *Cherry* v. *Lamar*, 58 Ga., referred to in a previous part of this argument, as showing that limitation does not begin to run upon a subscription until a call is made, and distin-

guishing that case from the case at bar, the court said by the Chief Justice: "There the charter of the bank made a call by the directors, and sixty days' notice of it to the stockholders, conditions precedent to the collection of unpaid stock subscriptions, and it was consequently held that the statute did not commence to run against such a liability until the requisite call had been made and notice given." And the same distinction had been previously taken and acted upon by the Supreme Court of Georgia itself; for in *Kimber* v. *Bank of Fulton*, 48 Ga., 419, which was, like *Terry* v. *Tubman*, 92 U. S. R., and *Terry* v. *Anderson*, 92 U. S. R., 632, a case of the first kind, it was held that the statute of limitations began to run against the liability of the stockholders from the time of the notorious insolvency of the bank; while in the subsequent cases of *Macon, &c., R. R. Co.* v. *Vason*, 52 Ga., 326, and in *Cherry* v. *Lamar*, 58, Ga., 541, 542, 543, which were cases of the second kind, it was held that the statute began to run only from the time when an assessment and call had been made upon the unpaid subscriptions.

A further and cognate confusion of thought has arisen from confounding the nature of the contract of subscription payable when called for, and the rights growing out of such contract in favour of the creditors, with the nature and grounds of the equitable (or special statutory common law) remedies by which that contract may be enforced. It is settled law and practice that upon a judgment against a corporation and execution returned unsatisfied, a creditor, may, by bill in equity against a stockholder, compel him to pay the whole of his subscription in satisfaction of the judgment debt, and the stockholders's plea that his liability by the terms of his contract is only to pay when called for by the corporate agency will not be heard; and it is held that the suit itself against him is a sufficient call and demand to justify a recovery for the whole amount of his indebtedness to the corporation. *Henry* vs. *R. R.* Co., 17 Ohio, 187; *Hatch* vs. *Dana*, 101 U. S. R., 205. And it has been therefore argued that upon the known insolvency and disorganization of a company, a right of action immediately arises in favour of the creditors directly against the stockholders upon their unpaid subscriptions; that no call or assessment is necessary; that the suit itself against the stockholder would be a sufficient call and demand, and hence that the statute of limitations begins to run from the time that such suit might have been brought, and that it might have been brought at

any time after the failure of the corporation and the abandonment of its business.

But the argument overlooks alike the nature of the contract of subscription and the grounds of equity (or special statutory common law) jurisdiction to enforce it without a literal compliance with its terms. A subscription is the individual contract of the subscriber with the corporation and converts him into the debtor of the corporation to the amount subscribed, payable according to the terms of the contract. But while this is true the subscriptions are mutual contracts as between the subscribers *inter sese*, and by the constitution of the corporation an agency under the control of the subscribers is charged with the duty of levying an equal assessment *pro rata* on the subscriptions as the exigencies of the company may require for the payment of its debts and the carrying on of its business.

But while between and among the members of the company the subscriptions are mutual contracts, and by their terms are enforceable only upon calls made by the associate agency, yet the subscriptions constitute the fund upon which the company is organized and contracts debts, and that fund is, in contemplation of law, a trust fund primarily for the payment of debts, and the default in duty of the corporate agency to make the necessary calls for that purpose is regarded as the default of the principals by whom the money is to be paid, and upon judgment and execution against the corporation the default of calls is not allowed to excuse default in payment of the debt owing to the company upon the faith of which the creditor had relied in giving it credit.

In *Curry* vs. *Woodward*, 53 Ala., 378, the Supreme Court of that State well say: "The contract of subscription, however, was mainly, and its terms in respect to payment *pari passu* upon calls, entirely an arrangement of the stockholders *inter se*, stipulations among themselves, and *as such* the courts would enforce them. But the sums they thus agreed to pay were in fact withheld from the company. Those sums were a part of its capital, on the faith of which it did business and others did business with it. Its creditors had just claims upon these moneys wherever they were, as part of that capital."

That was a proceeding under a special statute authorizing a direct common law process of garnishment against one or more stockholders to enable a judgment and execution creditor of a corporation to obtain what was due to him by compelling payment of the unpaid subscrip-

tions, and to the suggestion that the statutory remedy was in violation of the contract of subscriptions the court replied that "the corporation *was under the control of its stockholders*, and the law enabled any one or more of them who paid a larger share of their subscriptions than others to go against them for contribution;" that "the obligation of their contract extended beyond the special stipulations or arrangements between the stockholders themselves, and bound them to apply so much of the capital stock as was necessary, and that they should not by any arrangements hinder it from being applied to the payment of the company's debts." P. 378.

We have here the germ and substance of the whole matter. The subscriptions constitute debts to the corporation. By their terms they are payable when called for by the corporate agency. This corporate agency is the agency of the stockholders, who compose the corporation, and generally consists of the president and board of directors. It is the duty of those official agents to levy an assessment upon their principals (the stockholders) when needed for the debts of the company. The failure to make such levy is, in contemplation of law, the default of the stockholders by the default of their agents. And when a creditor of the corporation has obtained against it judgment and execution unsatisfied, and by way of attachment, garnishment, bill in equity, or otherwise, seeks to realize the debt to the corporation in the hands of the defaulting stockholder, it does not lie in his mouth to say that he is exempt from payment because of his own default in not having had a call made upon himself and his co-stockholders; and the law regards a summons against him as a sufficient call and demand for the debt that he owes to the company; and it matters not how the failure to make the necessary assessment may be accounted for—it matters not whether it be due to mere neglect of the corporate agency, or to disbandonment of the company and relinquishment of its business, or to its entire dissolution, solvent or insolvent—it is the established *fact* (and because of the fact) that the stockholders have not availed themselves of the privilege, and have not performed their common legal duty among themselves and as to the creditors of the company of laying, or having laid, the needed assessment upon their subscriptions, and have thus evaded payment of the instalments required for the debts of the company—it is this fact that the law will not tolerate as an excuse for the wrong thus asserted and implied, and therefore allows a judgment and execution creditor of the derelict

corporation to seize upon and realize the whole amount of the indebtedness to it of the derelict corporator precisely as it would seize upon and realize any other debts and assets due or belonging to the corporation.

It was upon these principles that *Henry* vs. *R. R. Co.*, 17 Ohio, 187, *supra*, was decided. And it was upon the same principles that *Hatch* vs. *Dana*, 101 U. S. R., 214, *supra*, was decided. On a bill in equity in each case founded upon a creditor's judgment and execution unsatisfied against the corporation, seeking payment of unpaid subscriptions from one or more stockholders, the court held the doctrine above stated.

In the Ohio case, pp. 189, 190, 191, it is said: "The company could compel payment at law of the stockholder's contract according to the charter when the necessities or the interests of the parties should require this to be done, and if the company does not, by such means or some other, provide funds for payment, there seems to be no good reason why the judgment creditor should not have the remedy here sought. * * * There was a moral obligation both upon the officers and the stockholders to use the property and claims of the company as far as they would reach for the payment of the demands of the creditors. And when the company cease to keep up their organization and abandon all action under the charter, a proceeding at the instance of the creditor becomes indispensable. * * When the company, as in this case, being insolvent, abandon all action under their charter, the original mode of making calls upon the stockholders cannot be pursued. The debt, therefore, from that time must be treated as due without further demand.

In *Hatch* vs. *Dana*, 101 U. S. R., the Supreme Court said, p. 214, that assuming that the terms of his subscription "contemplated a formal call, yet the subscription was still in the nature of a fund for the payment of the company's debts, and it was the duty of the company to make the calls whenever the funds were needed for such payment. If they were not made, the officers of the company violated their trust, held both for the stockholders and the company. And it would seem to be singular if the stockholders could protect themselves from paying, what they owe, by setting up the default of their own agents."

The company had gone out of business. There were no officers to make the calls, and the president was dead. The court held that nevertheless equity could enforce payment; that

a company call was after all but a process of collection, and equity would pursue its own mode of collection so that no injustice would be done to the debtor, that in England *mandamus* might be awarded to compel the directors to make the necessary calls, but that that remedy could avail only when there were directors, and that the remedy in equity was more complete and was well recognized. Neither in the Ohio case, nor in *Hatch* vs. *Dana*, which cited and approved that case, was any suggestion made as to the statute of limitations, and obviously for the reason that it had nothing to do with the matter. The question involved was as to the remedial powers of a court of equity upon judgment and execution unsatisfied against a principal debtor to realize its assets for the payment of its debts, which were in the hands of its debtor, a component part of the corporate body, whose official agency had defaulted in not calling upon the derelict defendant to have forthcoming the money due for and pledged to the payment of the corporate debts.

Obviously an action by the company or its assignee or representative to collect the unpaid suscriptions stands upon an entirely different footing. In such case the action must be based upon the terms of the contracts of subscription, and no action can be maintained until a call is made.

In *Robertson* vs. *Sibley*, 10 Minn. (1865), pp. 323, 324 and pp. 330, 331, the Supreme Court of Minnesota had occasion to examine what was said in *Henry* vs. *R. R. Co.*, 17 Ohio 187 (and approved in *Hatch* vs. *Dana*), namely, that upon the insolvency of a company and the abandonment of its charter, the unpaid subscriptions to its stock "may be treated as due without further demand." Robertson sued Sibley in a statutory action at law to recover in behalf of a creditor unpaid subscriptions to the stock of an insolvent and abandoned corporation, and relied upon *Henry* vs. *R. R. Co.*, to support the action. See p. 325. On page 329 the court say: "The terms of this contract on the part of the stockholders are to pay the amount when called by the company, in instalments not exceeding ten per cent. each upon thirty days' notice. Here are three conditions or qualifications of the promise: First, a call by the company; and this not a call upon the individual stockholder, but upon the whole stock of the corporation; second, for an amount not exceeding ten per cent. of the stock; third, thirty days' notice.

"The complaint does not allege a call for any instalment or for any amount, either upon the whole stock or the defendant individually, but avers that no call has been made; nor does it allege any default except that 'defendant has not paid to exceed five per cent. of the amount of stock subscribed for by him.'

"We are unable to see, in this state of the facts, any breach of the contract on the part of the defendant, upon which the company can maintain an action against him.

"The complaint seeks to avoid this difficulty by alleging the insolvency of the company, its refusal to call for instalments of stock subscriptions, or make provision for the payment of its debts; the total abandonment of the work for which it was created, and of its own organization since some time in 1859.

"We do not think these circumstances affect the rights of the parties in this action. In a direct proceeding in equity by a creditor against a corporation and its stockholders, invoking a court of chancery to subject the unpaid stock of a corporation to the liquidation of its liabilities, the creditor might perhaps avail himself of these facts as a ground of equitable relief. But the plaintiff—the sheriff—in this action, as we have before endeavored to show, has no other rights in this matter than such as pertain to the company as against a stockholder, and in such case we think it cannot be claimed that the facts pleaded strengthen the claim of the company to recover for a breach of the contract of subscription to its stock; on the other hand they go directly to defeat such claim." The court proceeded further to discuss the matter, and after quoting the expresion used in *Henry* vs. *R. R. Co.*, in 17 Ohio, 187, to the effect that from the time of the insolvency of the company, and the abandonment of its business, the subscription of the stockholder must be "treated as due without further demand," the court said: "This may be true in equity in an action by the creditor against the company and stockholders, in which it was enunciated, but the same rule will not apply in an action by the company against a stockholder on his stock subscription, since such a state of facts throws the whole default upon the company.

"We are of opinion, therefore, that the complaint does not state facts sufficient to constitute a cause of action."

(In confirmation and illustration of the same views see *Chandler* vs. *Keith*, 42 Iowa, 99, and *Chandler* vs. *Siddler*, 3 Dillon's C. C. R., 477, cited *supra*, p. 24.)

"The same rule of action will not apply in an action by the company against a stockholder on his subscription, *since such a state of facts throws the whole default upon the company.*"

In this last expression we have the kernel and *gist* of the whole matter. In equity, and under special statutory proceedings at law upon judgment and execution unsatisfied against the company, the default of the company and its agents in not having made the necessary call will not be allowed to prevent the creditor from realizing the company's assets in the hands of the stockholder. That, indeed, would be to permit the stockholder to plead and profit by his own wrong; and the fact that the law, under such circumstances, requires the payment of the whole of his indebtedness to the company, so far from showing that his obligation has ceased, or been barred by lapse of time, or any other cause, is the strongest proof and illustration that it is held to be still binding and in full vigor, and will be rigorously enforced. And on the other hand the same reasoning by which such jurisdiction for enforcement has been established is equally applicable in a suit upon the contract of subscription to a plea of the lapse of time or the statute of limitations; for if no action can be maintained until a call is made according to the terms of the subscription it would be rewarding wrong and iniquity, if in an action duly brought within legal time upon a call regularly made *in invitum*, in proper judicial proceedings, a stockholder should be allowed to plead limitation upon the ground of his own default and that of his agents in not having voluntarily made the necessary call upon himself at the proper time, and accordingly no such plea has ever been sustained in any known reported case.

The two classes of cases of which we have above spoken, so far from being in opposition to each other, are thus seen to be founded upon the same general principle. And hence it will be seen, in accordance with the foregoing views, that the courts whose decisions are cited in *Hatch* vs. *Dana* as leading cases establishing the jurisdiction of equity in a creditor's bill on judgment and execution against the corporation unsatisfied to realize the whole of an unpaid subscription of a stockholder in the failure and absence of a corporate call, have also held in actions founded upon the terms of the contracts of subscription that the statute of limitations does not begin to run until a corporate call is made. Thus while in *Henry* vs. *R. R. Co.*, 17 Ohio, 187, the remedial process of equity was illustrated to reach unpaid subscrip-

tions without a previous call, which case was decided in 1848, yet in the subsequent cases in the same State of *Gibson* vs. *Columbia &c. Co.*, 18 Ohio St. 396, decided in 1868, and in *Kilbreath* vs. *Gaylord*, 34 Ohio St. 305–309, decided in 1877, it was held that the statute did not begin to run until the call was made by the company. *Ward* vs. *Griswoldville M. Co.*, 16 Conn. 593 is the leading case of the remedial power of equity to realize the whole of the unpaid subscriptions, and yet in *Hope Ins. Co. &c.* vs. *Weed*, 28 Conn. 51, 68, it was held on a note given for unpaid subscriptions that no cause of action accrued upon the note until a call was made, and that the statute of limitations did not begin to run until that time. The last case referred to by the Supreme Court in *Hatch* vs. *Dana* as illustrating the equity jurisdiction was that of *Dalton, &c. R. R. Co.* vs. *McDaniel*, 56 Ga. 191; and yet in the previous case of *Macon, &c. R. R. Co.* vs. *Vason et al.* 52 Ga. 326, and in the subsequent case of *Cherry et al.* vs. *Lamar*, 58 Ga. 541, it was held that the statute did not begin to run in favor of the subscribers as to unpaid subscriptions until a corporate call was made.

And though in *Ogilvie* vs. *Knox Ins. Co.*, 22 How., 380, and in *Hatch* vs. *Dana*, the equity jurisdiction to seize upon the whole unpaid subscriptions, as a trust fund in the hands of derelict corporators, to pay a judgment and execution debt unsatisfied against the corporation was fully sustained, and illustrated and enforced by the similar cases above referred to in Ohio, Connecticut and Georgia, yet we have seen that in *Terry* vs. *Anderson*, 95 U. S. R., 634–636, the Supreme Court cited and approved the principle adjudicated in the said case of *Cherry* vs. *Lamar*, 58 Ga., 541, that the statute does not commence to run against such a liability until the requisite call has been made.

It is thus demonstrated that the remedy afforded to the creditor by special statutory provisions or by the remedial power of equity upon judgment and execution against the corporation to recover satisfaction out of the whole unpaid subscriptions of the derelict corporator has nothing to do with the question of limitations, so far as suits upon the contracts of subscription are concerned.

And now after having taken the unnecessary labor to demonstrate this obvious proposition, while the foregoing sheets were going to press, here unexpectedly come to the writer two cases recently decided by the Supreme Court of the United States, which settle the whole

question so far as that high court is concerned. In *Ager* vs. *Murray*, decided March 6, 1882, it was held: "It is within the general jurisdiction of a court of chancery to assist a judgment creditor to reach and apply to the payment of his debt any property of the judgment debtor, which by reason of its nature only, and not by reason of any positive rule exempting it from liability for debt, cannot be taken upon execution at law; as in the case of trust property in which the judgment debtor has the entire beneficial interest, of shares in a corporation, or of choses in action. (*McDermott* vs. *Strong*, 4 Johns. Ch. 687; *Spader* vs. *Hadden*, 5 Johns. Ch. 280, and 20 Johns. 554; *Edmeston* vs. *Lyde*, 1 Paige 637; *Wiggin* vs. *Heywood*, 118 Mass. 514; *Sparhawk* vs. *Cloon*, 125 Mass. 263; *Daniels* vs. *Eldridge*, 125 Mass. 356; *Drake* vs. *Rice*, 130 Mass. 410)." Morrison's Transcript of the Decisions of the Supreme Court, vol. iv, No. 1, p. 176.

And with that decision fresh in its mind the same court, on the 13th of March, 1882, held, in *Scovill* vs. *Thayer*, that upon the contract of subscription to capital stock, payable when called for, a cause of action does not arise until the call is made, and that the statute of limitations does not begin to run until from that day. The case was an action at law brought by the assignee in bankruptcy of a bankrupt corporation against a stockholder for the amount of an assessment which had been made by the court in bankruptcy upon the unpaid subscriptions. The Supreme Court said (by Mr. Justice Woods) as follows: "We are next to consider whether, upon the facts as disclosed by the record, the defense of the statute of limitations should have been sustained. The precise question with which we have to deal is: When would this action at law, brought by the assignees of the bankrupt company against a stockholder to recover a part of the balance due on his stock, be barred by the statute?

"This will depend on the answer to the question: When did the cause of action accrue to the assignees? In other words, when could they have commenced this action against this defendant to recover the amount due on his stock? (*Wilcox* vs. *Plummer's ex'ors*, 4 Pet., 172; *Amy* vs. *Dubuque*, 98 U. S., 470)."

In that case the stock had been issued as paid up stock, and there was an express contract between the company and the stockholders that they should never be called upon to pay any further assessments upon the stock. If in any case limitation could be supposed to run against unpaid subscriptions that certainly would seem to have been

such a case; for the express agreement between the company and the stockholders that no further assessment should be made was certainly as strong in legal effect to excite the statute into activity as any implied denial of liability imaginable to arise from the known insolvency of the company, the abandonment of its business and the disorganization of its government.

But the learned court proceeded to show that the said contract, though binding between the company and the stockholders, was, upon well-established principles, a fraud and of no effect as to the creditors, whose debts had been contracted on the faith of those subscriptions, and which equity would hold as a trust fund for their payment.

Having disposed of that defense, the court recur to the question above stated and proceed: "The question for solution is, therefore, when, under the facts of this case, did the cause of action accrue against the defendant in error? Certainly not until it became his duty to pay according to the terms of his contract or according to law.

"It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do, (*Curry* vs. *Woodward*, 53 Ala. 371; *Robinson* vs. *Bank of Darien*, 18 Ga., 65; *Ward* vs. *Griswoldville Man. Co.*, 16 Conn. 601). But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call by the company, there must be some order of a court of competent jurisdiction, or at the very least, some authorized demand upon him for payment. And it is clear the statute of limitations does not begin to run in his favor until such order or demand. (*Van Hook* vs. *Whitlock*, 3 Paige Chan. 409; *Salesbury* vs. *Black's adm'r*, 6 Har. & J., (Md.) 293; *Sinkler* vs. *Indiana, &c. Turnpike Co.*, 3 Penn. 149; *Walter* vs. *Walter*, 1 Whart. (Penn.) 292; *Quigg* vs. *Killeridge;* 18 N. H. 137; *Nimmo* vs. *Walker*, 14 La. Ann. 581)." *Scoville* vs. *Thayer*, Morrison's Transcript of Decisions of the Supreme Court, vol. 4, No. 1, pp. 179, 190–193.

The two cases above given, it is understood, will appear in the next volume of the Supreme Court Reports, being the XIV of Otto and the 104th of the Reports. 105 U. S., 129, 143.

We have thus shown, it is submitted, beyond the possibility of controversy, both upon principle and authority, that in an action

by a corporation, or by its assignee or representative, to collect subscriptions to its capital stock, payable by the terms of the contract when called for by the constituted corporate agency, an assessment and call is a condition precedent and necessary to give rise to a cause of action, and therefore that the statute of limitations does not begin to run until an assessment and call is made. The decisions of the Court of Appeals of Maryland in the *Balt., Turnp. Co.* vs. *Barnes*, 6 Harr. & J., 57, and in Taggart's appeal, 24 Md., 564, to this effect, needed no such vindication as the wealth and variety of the cases above given have furnished in illustration of the reason, common sense and justice upon which those decisions were founded. The law which they promulgated is well recognized in England and America, and, as has been shown, is fully established by an unbroken and uniform current and concurrence of decisions by the highest courts in both countries.

The trustees, as has been seen, had no power themselves to make the call, and if they had such power, or, if not having it, it was their duty, under the deed, by suit to require a call to be made, they were nevertheless (*in invitum* as to the creditors) the appointed and trusted agents of the stockholders and the company, and in either case, in failing to perform their duty, in the language of the Supreme Court, in *Hatch* vs. *Dana*, 101 U. S. R., 114, "they violated their trust, held both for the stockholders and the company. And it would be singular if the stockholders could protect themselves from paying what they owe by setting up the default of their own agents," in not making or requiring to be made a call upon their principals to pay what was necessary for the proper fulfilment of the trusts those principles had created and were bound to fulfill.

But whether or not the power of making the proper call was vested in the trustees, and whether or not the right to exercise that power, wherever vested, was barred by lapse of time, are both questions which have been decided by the Chancery Court of Richmond in a case involving the construction of the deed of trust and the charter of the company, and that court has concluded those questions by holding that the trustees had no power to make the call, and by itself exercising that power has judicially settled that its exercise was not then barred by lapse of time; and therefore neither question can now be raised here in this collateral proceeding.

It is understood that in Maryland limitation applies, at the earliest

time, three years after the cause of action has arisen. In this case the cause of action by the trustees in the assignment arose only when a call and assessment was duly made. Such call and assessment was not made until the 14th of December, 1880, and this action by the substituted trustee against the defaulting and derelict stockholders was promptly brought and has been vigorously prosecuted, and for the cause of justice and the honor of jurisprudence it is sad to know that it has been thus far prosecuted in vain.

We respectfully insist that the replication to plea No. 4 is fully sustained by the facts shown in the record of the chancery suit, by stipulation of counsel made part of the case, and that upon the law arising on those facts the demurrer to plea No. 7 should have been sustained.

III. The next question which arises is, whether said assessment or call was lawfully made by competent authority; for if it was so lawfully made, the amount called for is now legally due by the stockholders, whose subscriptions have to that extent been unpaid, and that question brings up the inquiry as to who were the necessary parties to the proceedings in the Richmond suit by which the call was made. Assuming that the court was a tribunal of competent jurisdiction to make the call, and that when the call was made, the court had before it all the parties necessary to bring that jurisdiction into activity, it must follow that the call made was binding as to all persons whom it affects wherever they may be. The court had before it the creditors, who were the beneficiaries under the deed of trust, the trustees in the deed, the corporation and even its President and Board of Directors, all by due legal process, according to the law of the domicile of the corporation. Plea No. 8 alleges that the defendants in the present action were not made parties to the proceedings, and were never served with process, or summoned, and never appeared therein; and Plea No. 9 alleges that none of the stockholders of the corporation were made parties to the suit or as such were served with process or summoned or appeared therein.

These pleas, taken together, in substance assert that stockholders or at least some of them, were as such necessary individual parties, and should have been served with process in order to give jurisdiction to the court and validity to the proceedings which resulted in the said assessment and call. To these pleas, the plaintiff demurred.

The first suggestion which strikes the mind upon the announcement

of this proposition is that sad would be the fate of the creditors of a company like this, if in order by legal proceedings to establish their debts against the corporation and compel satisfaction out of its property conveyed in trust for their payment consisting of the unpaid subscriptions of delinquent stockholders and, to make a call upon the same according to the terms of the subscriptions, it were necessary to serve process upon the thousands of such stockholders who are out of the jurisdiction of the domicile of the corporation or to depend upon their voluntary appearance to give jurisdiction against themselves, or to prove by legal evidence that any one or number of stockholders who might be served with process within the jurisdiction were duly authorized and empowered to represent the non-resident stockholders who had not chosen voluntarily to appear and represent themselves. The contention implies that the corporation, which is composed of the whole of its corporators, and is the legal unit and personality of the whole, is not the organ and representative of the whole; that the whole is not equal to its parts; that it is a domestic corporation, for the purpose of acquiring property and making contracts and bringing suits to protect itself, but a loose association and alien partnership for the purpose of preventing service of process in suits brought to enforce its contracts and subject its property to the payment of its debts; that it is *one* for its own interest, and a *multitude* of foreign fragments as to the rights of others; and that, in order to effectuate so laudable a scheme of fraud, the law imposes upon its creditors the impossibility of serving process upon the separate and scattered atoms. It is submitted that for the objects of the Virginia suit no such duty was imposed.

Undoubtedly, a judgment against a person who has not been served with process, or received notice, or appeared to the suit, is void. But it is equally true that a man may agree that service upon, or notice to his agent, shall be valid against himself, and he may authorize an agent to appear for and represent him, or he may agree to receive any particular mode of notification of legal proceedings; and if process is served, or notice is given according to his contract, the judgment against him is binding. It is upon this principle that an attorney at law, if not by virtue of his office, is often, by special employment, authorized to receive notice, and to appear for and represent his clients; and in such case the judgment against his clients is as binding as if rendered upon personal service of process. By many

of the States, statutes have been passed requiring as a condition precedent to the power of a foreign corporation to transact business within the State that it shall agree to appoint and shall appoint an agent to receive service of process against it; and it has been uniformly held that a judgment against the corporation, duly acquired by process so served, is valid and binding; and in *Lafayette Insurance Co.*, vs. *French*, 18 How. 404, it was held that such a judgment under the Federal Constitution is entitled to receive the same faith and credit in every other State which it has in the State in which it was rendered. Such agreements to receive service of process or notice, if duly acted upon, seem to operate by way of estoppel, and exclude denial of the jurisdiction founded upon such service or notice. Having submitted himself to the local jurisdiction by procuration, the party agreeing to be so bound will not be heard to deny the jurisdiction which he has accepted and invoked. He is bound by his contract, as by any other contract made for sufficient consideration, or upon which innocent third parties have dully acted. It was upon this principal that *Vallée* vs. *Dumergue*. 4 W. H. and G. (4 Exch.) 289, was decided.

In that case, an English subject had become a shareholder in a French company, subject to the liabilities and rights attaching thereto, and it was necessary by the law of France that he should elect a domicile in France at which the directors of the company might notify him of all the proceedings relative to the company or to himself. By the law of France, all proceedings affecting any party having his real domicile out of that kingdom, left for him at such elected domicile, were as valid as if left at his real domicile in France. This, it will be seen, was a contract or agreement to receive constructive notice of legal proceedings. He became liable as a shareholder to pay a certain sum, and to be sued for the same by the plaintiffs. To recover the amount, the plaintiffs caused a summons to be left at his elected domicile, requiring him to appear in court at a certain time and place. The defendant did not appear according to the exigency of the writ, whereupon the plaintiffs recovered judgment by default. Upon that judgment the plaintiffs brought an action against the defendant in the Exchequer Chamber of England. The defendant pleaded that he was not, at any time, a resident of France, or within the jurisdiction of the court, nor subject to the laws of France; that he was never served with any process whatever, nor had he any notice

whatever of any proceedings in the action, nor did he appear in court or have any opportunity of defending himself against the claim, and the proceedings were taken in his absence and without his knowledge, privity or consent.

The court of Exchequer Chamber held that the plea was bad, and gave judgment for the plaintiffs. The court said, that upon the facts stated, there was no doubt of the right of the plaintiffs to recover. That was not a case in which there was a judgment against the company, but a case in which the defendant had agreed to accept service of process for a direct individual liability growing out of his relations to the company as a shareholder, and the French judgment against him was founded upon constructive notice, but was founded upon the terms of his contract to receive such notice, and was held to be a valid judgment, because of that agreement, and was recognized as such in England when suit was brought upon it. This may be said to be an extreme case, but it has often been recognized as a correct exposition of the law, and obviously the more extreme it may be considered, the stronger it becomes, as an illustration of the principle that when a man contracts to receive notice of legal proceedings and such proceedings are had in accordance with the terms of his contract, he is as much bound as if he had received personal notice, or had appeared as a party. And this, although in point of fact, as was the case in *Vallée* vs. *Dumergue*, he had no actual knowledge whatever of the suit.

The next example to which we shall refer is that of the *Bank of Australasia* vs. *Harding*, 9 M. G. & S. (67 E. C. L.) 660. In that case the Bank of Australia was an unincorporated banking association, and by an act of the Legislature of New South Wales, the terms of which were accepted by the association, it was provided that the association might sue and be sued in the name of the chairman for the time being. The Bank of Australia became indebted to the Bank of Australasia in the sum of £175,000, and to recover the amount the Bank of Australasia brought suit in the Supreme Court of New South Wales against the chairman, for the time being, of the Bank of Australia, and recovered judgment against the bank. The members of that company were liable as partners, the company being unincorporated, except in so far as the legal capacity of suing and being sued collectively by its chairman gave it the character of a juridical person for jurisdictional purposes,

and thus made it for such purposes a *quasi* corporation. Angell & A. Corp., §§ 25, 58, 76; *Oliver* vs. *Liverpool, &c. Ins. Co.*, 100 Mass., 531, 538, 539. 540; Wordsworth on Joint Stock Companies, 41, 175.)

Upon that judgment against the Bank of Australia, the Bank of Australasia brought an action in the Court of Common Pleas in England (colonial judgments being considered foreign judgments), to recover the whole amount against Harding, who was a member of the company. By various pleas elaborately drawn, the defendant set up the defence in substance that he was not a resident of New South Wales, and had not been served with process, was not a party to the suit in the Supreme Court of that colony, had not appeared and had received no notice of the same, which is in substance the defence pleaded in this case. But Lord Chief Justice *Wilde* and the whole Court held that the plea constituted no defence to the action, and that by becoming a member of the company the defendant had dealt with the public upon the terms of the colonial act by which the company might sue or be sued by its chairman, and that he had assented to the chairman's being considered for all purposes connected with the suit as his representative. *Maule*, J., said: "I fully concur with what has fallen from the Lord Chief Justice." *Creswell*, J., said: "I am of opinion that the plaintiffs are entitled to judgment. From the pleadings it appears that the defendant was a member of a company who must be taken to be a consenting party to the passing of the colonial act. He must, therefore, be regarded as having agreed that suits upon contracts entered into by the company might be brought against the chairman and that the chairman should for all purposes represent him in such actions. Being his own appointed agent he had notice of the proceedings. If he had been resident in the colony he could not have made himself party to the action, or in any manner personally interfered in the proceedings." *Talfourd*, J., said he "was of the same opinion; that the plea stated that the defendant was never a resident in New South Wales, and had no notice of the proceedings, but the answer to that is, that the defendant was a member of a partnership carrying on business in the colonies, and was contented to leave his property there, to be regulated by the law of the colony."

This was in 1849. In 1851 the Bank of Australasia, upon the same judgment against the Bank of Australia, recovered in the Supreme Court of New South Wales, by service of process upon the chairman

of the company, instituted an action in the court of Queen's Bench in England against *Nias*, another member of the company; and the same defence was in different forms elaborately pleaded, that defendant was not a resident of New South Wales, had not been served with process, had not appeared therein, and had received no notice of the same. The counsel for the plaintiff was proceeding to state the case when he was stopped by the court, who desired to hear from the other side. And then *Bovill* for the defendants made an elaborate argument to show the nullity of the colonial judgment, contending that the act of the Colonial Legislature could give no jurisdiction against any others than persons actually present or having property in the colony; and quoting Story's Conflict of Laws, section 539, to the effect that "No sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions." Lord Chief-Justice Campbell interrupting said: "The question is, whether the defendant, being a shareholder in this company, was not virtually present in the colony;" and when the counsel replied that "service on one partner abroad could not be equivalent to service on another partner in England so as to affect his rights, and that the local act of the Colonial Legislature only regulated the mode of proceeding against persons resident within the colony, and had no extra territorial effect," the Lord Chief-Justice answered, "Surely it must have been intended that the judgment against the chairman should be available against all the members individually," and after much other discussion between the court and counsel and time taken for advisement, the unanimous judgment of the court was delivered by the Lord Chief-Justice, in which it was *held*, "that the colonial act was passed for the benefit of the Bank of Australia, established within the colony, and that the defendant was a shareholder in the bank when the act was passed and when the promises were made by the bank on which the action against the chairman was commenced; that the colonial legislature clearly had authority to pass an act regulating the procedure by which the contracts of the bank should be enforced in the courts of the colony, nor was there anything at all repugnant to the law of England nor to the principles of natural justice in enacting that actions on such contracts instead of being brought individually against all of the shareholders in the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the col-

ony which it would have had if the defendant had been personally served with process, and being a party to the record, the judgment had been personally against him. The act imposes no new liability upon him, but only regulates the mode in which that liabilty shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony cannot be obtained out of the colony, and unless the judgment may have been made the foundation of an action, it could not, in any manner, be rendered available in this country. In recompense for the advantages conferred upon the company by the act, it anxiously provides that the rights of the creditors of the company shall not be prejudiced by it." 71 E. C. L., 717.

This important case, involving so large an amount and establishing principles of so much consequence to similar companies existing in all the colonies of Great Britain is also reported in 20 Law. J. Rep. (N. S.,) Q B., 284, and in 4 E. L. and Eq., 252.

In 1874, these two cases, together with *Vallee* vs. *Dumergue*,* *supra*, came under review in the Court of Exchequer, in *Copin* vs. *Adamson*, L. R., 9 Exch., 345. To an action on a French judgment the defendant pleaded that he was not at any time before the judgment resident or domiciled in France, or within the jurisdiction of the court, or subject to the French law; that he was never served with any process, and had no notice or opportunity of defending himself. The replication was that the defendant was the holder of shares in a French company having its legal domicile at Paris, and became thereby subject to the law of France and to all the liabilities, &c., belonging to holders of shares, and in particular to conditions contained in the statutes or articles of association; that by these it was agreed that all disputes arising during liquidation between shareholders should be submitted to the jurisdiction of a French court; that every shareholder provoking a contest must elect a domicile, and in default, election might be made for him at the office of the Imperial Procurator, and that all summons, &c., might be served at the domicile formally or impliedly chosen; that the company became bankrupt, and defendant's unpaid calls became payable to the plaintiff as assignee; that he made default and provoked a contest; that he never elected a domicile, and thereupon the plaintiff caused summonses, &c., to be served at the office of the Imperial Procurator; that by the law of France that

* Cited and approved in *Pennoyer* vs. *Neff*, 95 U. S., 735, 736. See also *St. Clair* vs. *Cox*, 106 U. S., 353. And ex-parte *Shallenburger*, 96 U. S., 377.

office was the defendant's implied domicile of election for the purpose of service and the service was regular; and that the defendant was bound to appear but did not, whereupon judgment by default was recovered against him. Sir Fitzroy *Kelly*, Chief Baron, said, that before he proceeded to deal with the authorities, he would shortly state what he conceived to be the law bearing upon the plea: "I apprehend that it is now established by the law of this country that one who becomes a shareholder in a foreign company and therefore and thereby a member of that company—such company existing in a foreign country, and subject in all things to the law of that country—himself becomes subject to the law of that country, and to the articles and constitutions of that company, construed and interpreted according to the law of that country in all things and as to all matters and all questions existing or arising in relation to or connected with the acts and affairs and the rights and liabilities of such company and its members severally and collectively; and if that company, by the law of the country in which it exists or by the articles of its constitution is subject to the jurisdiction of a particular court within that country, so also is each shareholder or member subject to its jurisdiction in all cases in relation to or connected with such company."

And then the learned Chief-Baron proceeded to discuss the case of *Schibsby* vs. *Westenholz*, Law Rep. 6 Q. B. 155 (which was a case in which a foreign judgment had been obtained against a defendant without service of process or notice of any kind, and merely according to local law without any contract or consent on his part to subject himself to that jurisdiction) and said: "It is to be observed that in that case no fact was found imposing on the defendant the duty of obeying the judgment. The case was not one of a person alleged to be bound by the law of a foreign country and the judgment of a foreign tribunal by reason of his having become a shareholder in a company existing only under the law of that country, but it was one of a contract between the plaintiff, who was resident in England, and the defendant, who was resident in France, for the sale and delivery of merchandize. There was nothing to prevent the French seller suing the English buyer here for breach of contract, and nothing which rendered the latter amenable to a French tribunal. In the present case we have to consider the law as applicable not to an ordinary mercantile contract, but to persons who, though not resident in the foreign country, have become members of what we should call a joint

stock company, existing only in that country and subject to its laws."

And then the Chief-Baron cited at length *Bank of Australasia* vs. *Harding*, *supra*, and added: "It certainly seems to me impossible to have an authority more directly in point, and the *Bank of Australasia* vs. *Nias*, is to the same effect." And after having also cited and approved *Vallée* vs. *Dumergue*, he adds: "Upon all these authorities, therefore, it appears to me that the defendant is liable, and the principles they establish are, in my opinion, reasonable and just. The defendant, as a shareholder in this foreign company, becomes entitled to all the benefits resulting from the possesion of the shares; surely it is very reasonable that the laws of France, and, as is alleged in the first replication here, the articles of association also should provide that he should elect a domicile, and that if he does not, one may be elected for him, at which, process, if necessary, may be served. Otherwise it might be that a shareholder might, for years, receive all the benefits belonging to his position and yet escape all the burthens just because his real domicile was out of the kingdom of France, or there were no means of discovering where he might be, and enforcing a demand upon him."

In these views *Amphlett*, J., and *Pigott*, J., the associate justices concurred, though on another plea similar to the plea above stated, *but omitting all reference to the statutes or articles of association*, they differed from the Chief Baron, a matter, however, of no importance in respect of our case, as it will be shown that the shareholders in this company expressly became such under and according to the general statutes of Virginia in regard to corporations and joint stock companies and the special charter which, together, form the constitution and articles of association of the company.

In 1880, the whole subject as to the jurisdiction of foreign courts over Englishmen was brought under review, and the cases examined and summarized in *Rousillon* vs. *Rousillon*, by the Chancery Division of the High Court of Justice, L. R., 14 Ch. Div., p. 351, and on p. 371, Sir *Edward Fry*, J., in delivering the opinion of the Court, after speaking of *Schibsby* vs. *Westenholz*, *supra*, L. R. (6 Q. B.), 155, said: "What are the circumstances which have been held to impose upon the defendant the duty of obeying the decision of a foreign Court? Having regard to that case, and to *Copin* vs. *Adamson* (*supra*, L. R., 9 Ex., 345) they may, I think, be stated thus: The courts of this country consider the defendant bound, where he is a

subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued: where he has voluntarily appeared; and *where he has contracted to submit himself to the forum in which the judgment was obtained.*"

It will be seen that for all the purposes of jurisdiction over their rights, interests and property in, to, and in respect of the corporation of which they became members, the defendant shareholders in our case, by taking shares in the said company, not only contracted to submit themselves to the forum of the sovereignty by which the corporation was created, and in which the decree in question was obtained against the corporation, but that also in contemplation of law they, for such purposes, became inhabitants and residents of the country in which the corporation itself acquired its own domicile and has its legal existence.

The company is not merely an association of individuals, like the Bank of Australia, with unlimited liability, by legislative act united and made a collective body, with legal individuality only for the purposes of suing and being sued as one person (which would be sufficient for the exigencies of our case), but is a private corporation, pure and simple, endowed with perpetual succession and a common seal, with capital stock divided into shares, transferable by assignment, and the liability in respect to which and to all the obligations of the company is confined to payment of the amount of capital stock subscribed for and expressed upon the face of the shares, with the power in its corporate name of acquiring, holding, conveying and assigning property, real and personal, of contracting and being contracted with, of suing and being sued, of pleading and being impleaded, with the power of local self-government in its corporate capacity by its own president and board of directors, a legally constituted body for that purpose, authorized to make ordinances and by-laws and generally to carry on its business by corporate agents, with a principal office at the site of its domicile, which is the legal site of all its property and of its business; the whole being under the general control and direction of the shareholders. It was thus endowed by the sovereignty of its creation with complete legal individuality, representative in all things of the rights, property and business of the collective body of which it was composed.

The general statutes of the State of Virginia, in respect to corporations and to joint stock companies and the special charter granted to this company, subject to those statutes, thus constituted the articles of its association and the law of its being. One of the chief of these articles is the faculty of being sued and impleaded in its corporate capacity in the jurisdiction of its domicile; and every person who became a shareholder of its capital stock necessarily subscribed to that article and made it a part and one of the conditions of the contract by which his shares were to be acquired and held, and the property and business of the company to be regulated, conducted and controlled. The whole charter was a contract between the shareholders on the one part and the State of Virginia on the other, binding on both parties, and protected as such alike by the constitution of the State and of the United States, and it is plain that in consideration of the large and valuable franchises and privileges granted to the corporation by the State, including the power of contracting obligations in its corporate capacity, free from individual liability on the part of its members, the right of suing it and the duty of its submission to the jurisdiction for being sued in its corporate name and capacity, were reasonable and proper requirements. These requirements were, indeed, necessary to insure to the State and the public dealing with the corporation the means of enforcing performance by the corporators of all the obligations, of every character, of the compact made with the State and evidenced by the charter.

And it may here well be observed in passing that first among these obligations of the corporators were the contracts of subscription they were to make to the capital stock, and it would have been absurd on the part of the State to have allowed such contracts to be made payable *in futuro* without reserving and providing the means of enforcing payment otherwise than by personal suit against the thousands of the corporators in different and distant States taking shares in the $5,000,000 of stock, which was authorized by the charter. As the corporators were allowed to sue in their corporate name and the State agreed to allow that to be done, so the State required that the corporators might be sued in their corporate name, and they agreed that that might be done.

Therefore, in a suit in which the corporation is sued in its corporate name, in respect of its property, and in which jurisdiction is duly acquired over it by legal service of process, according to the laws of the

forum, a judgment against the corporation is in legal contemplation a judgment against the stockholders, who have agreed to be sued in that manner, and who by virtue of their corporate powers have all the means of protecting themselves by their own officers and agents wherever the suit may be brought. It is for these reasons that a judgment against the corporation wherever it is properly rendered whether in the State of its creation or elsewhere is binding upon the members of which it is composed. But in such a suit brought in the forum of its domicile and where jurisdiction is acquired according to the laws of that domicile, it is peculiarly proper that a judgment or decree against the corporation should conclude the stockholders. That is the home of the corporation and the sphere of its legal existence. In the familiar language of Mr. Chief Justice Taney, in the *Bank of Augusta* vs. *Earle*, 13 Pet. 519, the corporation can exist only within the limits of the sovereignty which created it, and cannot migrate to another territory. As far back as the time of Lord Coke, it was said to be an inhabitant of the place in which it was created, and was included in acts of parliament, applicable to inhabitants. In the nature of things it can have its residence only where it exists. For the purpose of jurisdiction in the Federal Courts it is a citizen of the State of its creation and domicile, and it is conclusively presumed that all of its shareholders are citizens of that State. *Ohio and M. R. R. Co.* vs. *Wheeler*, 1 Black, 286; and in *Muller* vs. *Dows*, 94 U. S. R. 444, it was expressly held that "A suit by or against a corporation in a court of the United States is regarded as brought by or against its stockholders, all of whom are for the purposes of jurisdiction conclusively presumed to be citizens of the State which created it."

In legal sense there is no difference whether the suit be brought against the corporation in a State court or a court of the United States. The corporation is a resident and denizen of the State of its birth and existence, and as it is composed of its corporators, in legal sense such is their residence also for the purposes of jurisdiction in respect of suits touching the corporate property. All of that property is owned by the corporation in the place of its domicile, and that is the *situs* of all of its movable property and choses in action everywhere. All the obligations due to it are due to it at its domicile and the principle office of its business, and among these, it has been expressly held, are the unpaid subscriptions to its capital stock. See

Penobscott R. R. Co. v. *Barthell*, 12 Gray, 266, Rorer on Interstate Law, section 203; Story's Conflict of Laws, sections 382, 383, 394-400. Wharton's Conflict of Laws, section, 363 (4).

In legal proceedings, therefore, in the domicile and local site of the corporation in which jurisdiction has been duly acquired over the corporate body in a court of competent jurisdiction by due service of legal process according to the law of the forum, to all intents and purposes all the property and rights of property and assets of the corporation are before the court, and represented by the corporation, and all of the corporators and especially those owing unpaid subscriptions are before the court, and represented by the corporate and legal individuality, and are residents of the domicile and forum and present in court. And if, in the case of a partnership and mere loose association endowed with legal individuality only for the purpose of suing and being sued, it was unanimously held in the *Bank of Australasia* vs. *Harding*, and the *Bank of Australasia* vs. *Nias*, by the Court of Common Pleas and the Court of Queen's Bench, that a judgment against the chairman of the company, (who was designated as the person to be collectively sued,) in the Supreme Court of New South Wales was binding upon the associates and partners in England as if judgment had been individually rendered against them, and those decisions have been severally and unanimously approved and affirmed by the Court of Exchequer and the Exchequer Chamber and the Chancery Division of the High Court of Justice, upon the principle that by becoming a member of such company and taking shares therein, the shareholders had accepted the articles and terms of the association and had agreed and contracted to be collectively sued in a *quasi* corporate capacity, by the name of their chairman—it would seem too clear for discussion that in regular judicial proceedings had in the domicile and forum of a complete corporation in which jurisdiction has been duly acquired by the competent court, a judgment or decree against the collective body must bind and conclude the shareholders who, by accepting the charter and taking shares in the company, have contracted and agreed to be sued in that manner.

Hence it is held in all the States of the American Union that a judgment against the corporation, in suits upon its contracts respecting its property, is binding and conclusive upon all of its members, and this especially in respect to unpaid subscriptions of capital stock. It is upon this ground that in some of the States, as in Mississippi and

Alabama, statutes have been passed which, upon judgment and execution against a corporation, unsatisfied, authorize process in the nature of attachment or garnishment, against stockholders for unpaid subscriptions, and the judgment against the corporation is held to be conclusive as against them in respect of the matters thereby adjudicated. *Curry* vs. *Woodward*, 53 Ala., is an example. And in all of the States in which equity jurisdiction has been invoked upon judgment and execution unsatisfied against a corporation, it has been held that equity has jurisdiction upon such judgment to require its stockholders to pay the whole of their unpaid subscriptions in payment of the debt, and the judgment against the corporation is considered as conclusive evidence against them.

In *Hatch* vs. *Dana*, 101 U. S. R. 215, several cases of the kind are cited, and that case itself is an illustration of the same rule. *Ogilvie* vs. *Knox Insurance Company*, 22 How. 380, was another case of the kind, and in that case the bill filed upon judgment and execution unsatisfied, made various allegations against the corporation, and it was taken for confessed, and even in respect to these allegations the court said (page 387): "The bill was taken *pro confesso* as against the corporation. The other defendants *being corporators, are consequently concluded as to the averments of the bill affecting them as such.*"

The only question ever made has been whether even in respect to collateral individual liabilities for the debts of a corporation imposed by special statutory provisions, beyond the liability for payment of subscriptions to the capital stock, a judgment against a corporation is not conclusive against its stockholders. On this subject *Morawetz* (Private Corporations, section 619), says: "A judgment obtained against the corporation is certainly conclusive (until reversed for error or impeached for fraud) in a suit to charge the stockholders upon their unpaid stock subscriptions, and by analogy it should also be held conclusive in a suit to charge them upon their additional individual liability to creditors. It must be borne in mind that a corporation is composed of its stockholders, and that a judgment obtained against the corporation is in reality a judgment obtained against the stockholders in their corporate capacity. There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice, once in the suit against the corporation through the corporate agents, and again in the suit brought to charge them individually."

And see the late and important case of *Stephens* vs. *Fox*, 83 New York, 313 (1881), which furnishes the most recent illustration upon the subject.

If indeed jurisdiction over the corporation does not embrace jurisdiction over the corporate contracts and property, and the corporate members in respect thereto, the fundamental articles of association by which the corporators agree and bind themselves to be sued in a corporate capacity would be null and void. In granting the valuable franchises of this charter, it cannot be presumed that the State of Virginia intended to exclude the jurisdiction of its own courts over those who, by accepting those franchises, had agreed to subject themselves to be sued in a collective capacity in her courts in respect of the obligations they were to assume, and thus to ignore and set aside the general law of corporations and the general rules and principles of law governing judicial proceedings in respect of parties and *privies*. 1 Greenl. Ev., section 523.

It has been shown that in judicial proceedings against a corporation touching its contracts and property, over which jurisdiction has been acquired, and especially in the forum of its domicile, the stockholders are not necessary parties in order that they may be bound by the judgment or decree. It may be said further that they are not even proper parties, being themselves fully represented by the corporation, according to the terms of their agreement in accepting the charter and contracting to be sued by their corporate name and agency. The corporation itself can only answer under its common seal. Story's Eq. Pl., sec. 235. *Baltimore & Ohio R. R. Co.* vs. *City of Wheeling*, 13 Grat., 62. And stockholders cannot answer for it. *Bronson* vs. *Lacrosse R. R. Co.*, 2 Wall., 283. And they cannot even appear and be heard for themselves. *Holyoke Bank* vs. *Paper Co.*, 9 Cush., 576; *Lane School District* vs. *Weymouth*, 10 Metc. 462; *Farnum* vs. *Ballard, &c.*, 12 Cush., 507; *National Bank of Augusta* vs. *Southern*, 55 Ga., 36; *Blackman* vs. *Cent. R. R.*, 58 Ga., 189; *Memphis, &c. R. R. Co.* vs. *Forbes*, 2 Woods, 323, which decisions fully sustain what was said in *Bank of Australasia* vs. *Harding*, *supra*, that if the shareholders had been on the spot they "could not have made themselves parties to the action, or in any manner personally interfered in the proceedings."

But it is sufficient for us to know that they were represented according to their own contract, by their own corporate individual-

ity and agency, and thus were in reason, law and justice, parties and privies in the Richmond suit, and are therefore bound by what was judicially done therein. They were by agreement, and by representation, fully before the court in that litigation, and are as much bound by its results as if they had been personally served with process.

It becomes necessary, therefore, only to ascertain what was done in that suit. First, the creditors secured by the deed of trust were before the court, and their claims were ascertained and established by its decree against the corporation. If there had been any defence (by way of limitations or want of consideration or otherwise) to any of those claims, that was the time when such defence should have been made. The decree establishing the claims was not entered until more than twelve months after the order was made directing an inquiry, and an account of the debts, before one of the Master Commissioners of the Court, and until more than twelve months after due publication of the time and place of taking the accounts, and the inquiry was commenced, and not until six months after the report of the Commissioner had been filed. Ample time and opportunity were thus allowed to the corporation to make any defence it had to any claim, and none was made. Both the original and amended bills were taken *pro confesso*, but the decree entered was not an ordinary decree by default. It was made after careful and elaborate inquiry, upon due service of process and full notice, and is beyond question binding upon the corporation, and upon the corporators whom it represented. The indebtedness of the company secured by the deed is therefore *res adjudicata*. As to decree by default see *Wren* vs. *Hamilton*, 16 Md. 329.

The next question involved in the suit was the validity and construction of the said deed of trust. In *Baltimore and Ohio R. R. Co.* vs. *Glenn*, 28 Md., that matter was said to be governed by the law of Virginia, and upon the assumption that the deed conveyed all the assets of the company the Court of Appeals of Maryland held that the deed was valid. The Richmond Chancery Court, whose peculiar function it was, construed the deed and held it to be valid, and that it conveyed all the assets of the company in trust for the payment of its debts, including the right to receive the unpaid subscriptions to the capital stock. But in construing the deed and the charter under which it was made the learned court also held that the deed did

not carry the corporate franchise and power vested in the President and Board of Directors of levying an assesement and call. This construction of the deed and of the charter is thus also *res adjudicata* as between the creditors, the corporation and the trustees, all of whom were duly before the court.

The next question was, What, under the circumstances, was to be done? The bills taken for confessed against the company, the proofs exhibited in the cause, and the answers of the trustees, all showed that the President and Board of Directors had failed and neglected to perform the legal and moral duty of making the necessary assessment upon the unpaid subscriptions for the satisfaction of the debts secured by the deed. There was but one thing for the court to do, and that was, itself to make the assessment and call in the exercise of the ordinary jurisdiction and power of a court of equity, recognized and established by the House of Lords of England as far back as the time of Charles II, exerted and illustrated by innumerable examples in this country during the last fifty years by the highest courts in the several States, and as late as March the 13th, 1882, asserted and approved (as it often had been before) by the Supreme Court of the United States, in the case of *Scovill* vs. *Thayer*, cited *supra*. See *Salmon* vs. *Hamborough*, 1 Cas. in Ch, 204; *Sanger* vs. *Upton*, 91 U. S. R., 56; *Upton* vs. *Hansbrough*, 3 Biss., 417; *Marsh* vs. *Burroughs*, 1 Woods, 463, and the numerous cases cited by Morawetz, § 577, *note* (1). In *Scovill* vs. *Thayer*, it was said by the Supreme Court: "It is well settled that when stock is subscribed to be paid upon call of the company, and the company refuses or neglects to make the call, a court of equity may itself make the call, if the interests of the creditors require it. The court will do what it is the duty of the company to do." In *Hall* vs. *U. S. Ins. Co.*, 5 Gill, 484, the Court of Appeals of Maryland had been a pioneer of the jurisdiction in this country, and the case is frequently cited by the Supreme Court of the United States, as in *Sanger* vs. *Upton*, 91 U. S. R., 59.

The right and power to make the call, and the necessity and propriety of its exercise, and the manner and extent of its exercise, were thus all adjudicated by the said decree of the Chancery Court of the 14th of December, 1880, in actually making the call. That whole matter, therefore is, also *res adjudicata*.

There was but one other question before the court. It was whether to keep in the execution of the trusts the trustees who were non-resi-

dents of the State, and out of the territorial jurisdiction of the court, (but who had submitted to its jurisdiction by filing answers to the cause) and who for fourteen years had obstructed the creditors in the collection of their debts, and had failed to perform their duty alike to the corporation, the stockholders and to the creditors, or to remove them and substitute an active and reliable trustee in their place and stead, with bond and security in sufficient amount to ensure the prompt and efficient execution of the trusts of the deed.

In its judicial discretion the Court accepted the latter alternative, and, it is submitted, most wisely and justly. Of the general jurisdiction of equity in such a case, to remove the old and substitute a new trustee, to execute the trusts, there can be no question. See authorities collected in 1 Perry on Trusts, § 275 (1882), and see *Hall* vs. *Bryan*, 50 Md., 194, 210.

But in addition to this inherent jurisdiction, the Code of Virginia (ch. 174, § 8,) expressly provided for the exercise of such power, and prescribed that "the trustee or trustees so appointed and accepting the same shall be substituted to all the rights, power, duties and responsibilities of the trustee named in said deed." The court, therefore, had the amplest jurisdiction and power to make such substitution of a trustee for the execution of the trusts of the deed, and it may be remarked, that the said deed of trust was executed, delivered and recorded by the corporation in Virginia, at its domicile, principal office, and the legal site of its business, and must be considered as having been made and intended to be construed and executed according to the laws of the place where the contract was made, which laws entered into and constituted an inherent part of the terms and conditions of the contract. The Homestead Cases, 22 Grat., 288.

And, obviously, if, in the administration of a trust, either by its general jurisdiction, or otherwise, Chancery has not the right and power to substitute an efficient for an inefficient trustee, or a live for a dead trustee, in order that the trusts may not fail, it must be emasculated of one the most important functions it daily performs.

The creditors, the old trustees, and the corporation being duly before the court, the removal of the old trustees and the substitution of the new one to execute the trusts of the deed, are also *res adjudicata*.

And these are all of the questions which were adjudicated by the decree in the Richmond suit.

It is submitted that as betweeen the creditors and the corporation,

and the old trustees and the substituted trustee, the whole matter is *res adjudicata* by a court of competent jurisdiction, having duly acquired jurisdiction over all of the parties. And that the Chancery Court of the city of Richmond is a court of due and general chancery jurisdiction and powers, as its name imports, may be seen by reference to the Code of Virginia, ch. 155, §§ 5, 6, and ch. 175. And in the absence of such plain appearance of jurisdiction, the Court of Appeals of Maryland has long ago held that "it is an acknowledged and fixed principle of universal obligation, resulting from the comity and respect due from one judicial tribunal to another, that a judgment of a court of record of a sister State is in itself *prima facie* evidence of jurisdiction; and it is not necessary for the party pleading such judgment, to set out affirmatively in his plea, the jurisdiction and facts upon which the power and authority of the court pronouncing the judgment depend." *Bank of U. S.* vs. *Merchants B'k of Balt.*, 7 Gill, 415. And see *Morgan* vs. *Neville*, 74 Penn. St., 53.

We therefore stand upon the Virginia decree as having adjudicated between the creditors secured by the deed, the trustees in the deed, the corporation which made the deed, and its corporators, all of the questions which are now sought to be raised in this collateral action at law brought by the substituted trustee against certain debtors of the corporation, who are no less debtors, but rather the more obligatory debtors, because debtors for unpaid subscriptions, upon the trust-fund and faith of which the debts of the corporation were contracted.

We stand upon the Virginia decree as an entirety, as evidence of the truth of everything it asserts. We have no need to invoke the law of international comity. That law has nothing to do with this case. If the decree in the Richmond suit was a valid decree, it was a judicial determination of the matters therein decided, and is entitled to be received, even in a foreign country, as evidence of all the matters therein and thereby adjudicated. A foreign judgment is entitled to credit simply as evidence of an adjudicated fact, and not upon the principle of comity. It is considered that the matter adjudged has been decided by a tribunal of competent jurisdiction, and is therefore not open for inquiry when that jurisdiction has once been properly obtained, and has been exercised. See 1 Greenleaf on Evidence, § 522, and §§ 540, 541: *Schibsby* vs. *Westenholz*, L. R., 6 Q. B. (159).

But the constitution and laws of the United States leave no doubt upon the subject. The decree of the Chancery Court of Richmond,

by that constitution and those laws, is entitled to the same faith, credit and effect in every other State which it has in Virginia, where it was rendered. It must be regarded in Maryland as a domestic decree, and if conclusive in the State where rendered, is equally conclusive in Maryland. *Wernwag* vs. *Pawling*, 5 Gill & J., 500. 2 Story on Const., §§ 1303-1313.

What then is the sum of the whole matter? A great corporation upon the faith of the unpaid subscriptions to its capital stock entered upon a great business and made a great failure, and left its creditors in the lurch, who had trusted to the honesty and good faith of those subscriptions. In its embarassments, it executed in its domicile a deed of trust, conveying the unpaid subscriptions to pay its debts. The trustees had no right to make an assessment upon the unpaid subscriptions for the payment of the debts, and the President and Board of Directors, in whom the power was reposed, failed in their duty to exercise it, and the trustees failed in their general duty efficiently to execute the trusts of the deed. The creditors convened the trustees and the corporation to require a judicial ascertainment of their debts secured, and in accordance with the priorities prescribed by the deed, and to compel the necessary assessment to be made on the subscriptions assigned by the deed in order to fulfill the trusts it created. The court of the domicile and forum of the corporation in due legal proceedings upon all the pleadings and facts appearing before it, judicially ascertained that, in order to fulfill those trusts, an assessment and call of thirty per cent. of the unpaid subscriptions was necessary and proper. The substituted trustee comes before a sister court of Maryland, and shows that such call has been made, and that he has been substituted in the place of the former trustees to require payment. He asks nothing of comity. He merely asserts and states that in respect to the defendants, judgment has been rendered against the corporation and themselves as to everything that he claims, and that that judgment is to be considered as a domestic judgment and adjudication of all the matters it determined, and is entitled to the same full faith, credit and effect in Maryland as if it had been entered and rendered in a court of Maryland. He affirms, in effect, that the corporation has assigned the unpaid subscriptions to pay its debts, that a legal call has been made upon those subscriptions for that purpose, and that he has been appointed to receive and enforce payment, and under the third and fourth clauses of the deed of trust, to which he has been substituted, he is duly authorized and empowered to sue for,

collect and apply the whole assets of the company to the payment of its debts. He is thus the duly authorized hand of the company and of the stockholders to collect the amount of the subscriptions ascertained by competent authority to be necessary to fulfill the trusts of the deed. That deed speaks for itself, and he speaks under the deed, and by virtue of competent authority in fulfillment of its trusts. And as the decree under which he acts is entitled to the same faith, credit and effect in Maryland as it is entitled to in the sister State of Virginia, where it was rendered, and as the defendant stockholders in this action were by agreement and representation duly before the Virginia court when the decree was rendered, it follows that they are concluded by that decree. In Maryland an assignee may sue in his own name (R. C. Md., p. 594, § 41), and he, as duly substituted assignee, sues in his own name.

If the defendants are not stockholders in the company, they can show the fact; or if they have paid in full their subscription, they can show the fact; but if they are stockholders, and have not paid their subscriptions, they are indebted to the company, and the plaintiff in its stead comes here and asks payment.

But it may be said that conceding that the stockholders everywhere are bound by the judicial proceedings in Richmond, in respect to everything else, yet that the substituted trustee can be regarded only as the receiver of a foreign corporation, attempting to collect its assets in another jurisdiction. *Ex gratia*, grant this to be true, and yet it does not follow that, under the circumstances of this case, the substituted trustee, as *quasi* receiver, may not be entertained in the courts of Maryland to collect the trust assets confided to his hands. *Booth* vs. *Clark*, 17 How. 322, is doubtless good law as applied to the facts in that case, but its broad statement, without due qualifications and restrictions, of the general principle involved, has led to much confusion of thought and misunderstanding of that principle, and to many loose statements in the text books upon the subject. The proposition is often stated in the broad terms that a receiver, however authorized to do so by the decree of his appointment, cannot and will not, under any circumstances, be entertained to bring a suit outside of the sovereignty of his appointment. We say that this is not true, and that in respect to the duly appointed receiver of a foreign corporation, it is not true either upon principle or upon the whole current of modern authorities.

Of course, if permitted to sue in another State, it must be upon the principle of international comity, which comity is regulated by the State and is administered by its courts, and will in large degree be controlled by the constitutional and legal relations between the sister States, by the similarity of their laws, the identification of their business interests and the furtherance of mutual convenience by mutual concessions, by the general rules and requirements of commerce and trade, by community of institutions, social ties, sentiments and affections.

The whole matter depends upon that degree of comity which a State, under the circumstances of a given case, may deem it respectful, right and proper to extend to duly authorized agent of a sister State the aid of its courts in the ends of justice. The rule is that comity will not be extended to take assets out of another State upon which the citizens of that State have acquired a previous lien by attachment or otherwise, and which may by the local law of the State be required for the satisfaction of creditors within the State.

But if no such condition of facts exists, there is nothing in the law of comity to prevent the entertainment by the courts of a sister State of a receiver of a corporation of another State to collect its assets. We say that there is nothing in principle against the extension and exercise of such a jurisdiction. Nothing, certainly, in principle. For if it be said that a foreign receiver derives his authority to sue only from an extra territorial jurisdiction, the reply is that the corporation itself has no legal existence except in that extra territorial jurisdiction from which it derives all of its authority and power to act at all or to sue and be sued, and it is simply and purely by the law of comity that it is permitted to make contracts, acquire property, and carry on business, and to sue and be sued, and to plead and be impleaded in another State. All this is allowed to a foreign corporation; and upon principle, why should not a Receiver deriving authority from the same source from whence the corporation derived its existence and powers, (when that authority is representing its rights, interests, and property), be entertained by the same comity?

Accordingly we find that the modern decisions establish such jurisdiction, and in proof see the following cases:

Runk vs. *St John*, 29 Barb., 585 (1859).

Lombard Bank vs. *Thorpe*, 6 Cowen, 46, 47 (1826).

Bidlack, rec'r, vs. *Mason*, 26 N. J. Eq., 230 (1875).

Cagill vs. *Wooldridge*, 8 Bar. (Tenn.), 580 (1876).
Graydon vs. *Church*, 7 Mich. 36, 52, 53, 54 (1857).
Mann vs. *Cooke*, 20 Conn., 178 (1850).
Bagby vs. *A. M. & O. R. R.*, 86 Pa. St., 291 (1878).
Dayton vs. *Borst*, *Receiver*, 7 Bos., 115; *Dayton* vs. *Borst*, 31 *N.* Y., 435, 438, 439.
Copin vs. *Adamson* L. R., 9 Exch., *supra*.*

And the authorities are equally full to show that the necessity for the receiver to sue, or any supposed irregularities in the proceedings of his appointment, cannot be questioned collaterally.

Stewart vs. *Lay*, 45 Iowa, 604.
Schoonover vs. *Hinkley*, 48 Iowa, 82.
Cook vs. *Citizens' Bank*, 73 Ind., 256.
Howard vs. *Whitman*, *rec'r*. 29 Ind., 557.
Ward vs. *Farwell*, 97 Ill., 593.
Attorney General vs. *Guardian Ins. Co.*, 77 N. Y., 272.
Whittlesey vs. *Frantz*, 74 N. Y., 457.
Jay vs. *DeGroot*, 17, Abb. Pr. (N. Y.), 36, *note*.

And in respect to the appointment of a substituted trustee, it is laid down as established law in the learned and judicious work of Perry on Trusts, § 275 (citing among other authorities, the Court of Appeals of Maryland, in *Paules* vs. *Dilley*, 9 Gill, 222,) that, "If the court have jurisdiction of the subject matter, mere irregularity in the proceedings, or in the appointment will not make it void in a collateral proceeding, nor can the regularity of the proceedings or of the appointment be inquired into in a collateral suit; such appointment must stand until it is reversed by a proceeding for the purpose in the same case."

Upon every ground, therefore, the Virginia substituted trustee is entitled and may be enterained to sue in the courts of the sister State of Maryland for the debts due to the corporation he represents, if, as is the case here, no Maryland creditor of the corporation has acquired any lien on those assets adverse to the rights of the trustee.

As a practical question, and in point of fact, the substituted trustee, Mr. John Glenn, is a citizen of Maryland and of Baltimore; and one of the largest creditors, secured by deed of trust, is the estate of W. W. Glenn, deceased (late of Baltimore), for money lent or paid (a

* For an excellent review of the cases, see Extraterritorial Jurisdiction of Receivers, 22 Am., Law Reg. (N. S.) p. 289 et seq., May, 1883.) *Bank* vs. *Macleod*, 38 Ohio, St. 183.

debt of $42,000 with interest from 1867), and among the other chief creditors are the Baltimore and Ohio Railroad Company, the Bank of Commerce of Baltimore, the Philadelphia, Wilmington and Baltimore Railroad Company, and Henry M. Bash, trustee, and other citizens of Maryland; and thus the great bulk of the debts of the company is due to the citizens of Maryland, and in order to recover trust money dedicated to the payment of those debts, this action was brought by the trustee. In great measure, it is virtually an action brought by citizens of Maryland, whose debts are established, to recover from other citizens of Maryland a small part of a large trust fund in their hands, which they, long ago, honorably consecrated to the payment of those debts, but have illegally withheld, ever since; and it is not perceived that any rule of comity intervenes against the common sense, right and justice of such a recovery, or that the same high considerations of enlightened jurisprudence, which inspired and distinguished the Court of Appeals of Maryland in affirming the validity of the of the deed of trust in the *Baltimore and Ohio Railroad Company* vs. *Glenn*. may not be invoked to give it practical effect.

IV. In respect to the pleas as to the pendency of other suits, it is deemed necessary to say but little. In the first place, all such pleas should have been pleaded by the corporation in the Richmond suit, and no such pleas were interposed in that suit, and they cannot be pleaded now for the first time in this collateral proceeding, by stockholders, who were parties (or privies) to that suit, to defeat the rights of their own trustee seeking to recover out of their hands the trust money which they have dedicated to the payment of their debts. In the second place, all of those pleas are pleas in abatement, and in order to be valid, should state the pendency of another suit between the same parties and upon the same cause of action, in a court of competent jurisdiction, which had duly acquired jurisdiction over the parties, and the continued pendency of such suit when the present action was instituted. Some of the suits referred to are still pending, but in none of them is the controversy between the same parties and upon the same cause of action as the suit in this case, and in none of the pleas is it averred that jurisdiction has been acquired over the parties in the suits pleaded. It is impossible to suppose that this learned Court can be diverted from the administration of justice by the forlorn extremity of such technical defences obviously suggested only by the fertility of despair. And we respectfully conclude in the language of

the Supreme Court of Maine in *Came* vs. *Brigham*, 39 Me. 41: "The defendant became a member of this corporation by his own voluntary act. Great and severe losses would seem to have been suffered by its stockholders. If the speculation had been successful, the defendant would justly have been entitled to the rewards of his enterprise. Neither the principles of law nor of equity require that the plaintiff creditor should bear the burthens resulting from ill-advised or badly managed schemes of public improvement, to which he was not a party, and from which he was to derive no gains. As between him and the defendant, his equity is the greater and he is entitled to judgment."

JOHN HOWARD,
of Counsel, with
CHARLES MARSHALL
and
W. A. FISHER, Esqs.,
for Appellant.

Richmond, May 22d, 1882

Office Supreme Court U. S.
FILED.
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JAMES. H. McKENNEY.
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888. No. 266

WILLIAM J. HAWKINS,

PLAINTIFF IN ERROR,

vs.

JOHN GLENN,

Trustee of the National Express and Transportation Company,

DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

CHARLES MARSHALL,
JOHN HOWARD,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

WILLIAM J. HAWKINS,

PLAINTIFF IN ERROR,

vs.

JOHN GLENN,

Trustee of the National Express and Transportation Company,

DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

This is a writ of error to the Circuit Court of the United States for the Eastern District of North Carolina, brought to reverse a judgment rendered by that Court in favor of the defendant in error in an action to recover from the defendant below, as a stockholder of the National Express and Transportation Company, an assessment levied upon the stock of said company by a decree of the Chancery Court of the city of Richmond, rendered on the 14th of December, 1880.

The cause of action set out in the declaration or complaint, is as follows:

1st. That the defendant subscribed for two hundred and fifty shares of the capital stock of the National Express and Transportation Company, a corporation under the laws of the State of Virginia, and promised to pay the company $100 per share

for each share, in such installments and at such times as he might be lawfully called upon and required to pay, according to the tenor and effect of the law under which the company was incorporated, and was thereupon received as a stockholder of said company.

2d. That on the 20th day of September, 1866, the company executed a deed of trust to three trustees, of all its property of all kinds, in trust for the payment of its debts, according to the terms of said deed of trust.

3d. That afterwards, in a cause instituted in the Chancery Court of the city of Richmond, in which certain creditors of the company, suing for themselves and all other creditors of the company, were complainants, and the company, certain of its officers and the surviving trustees, were defendants, it was, on the 14th of December, 1880, decreed that the plaintiff be appointed trustee in the room of the survivors of the original trustees named in the deed of September 20, 1866, who were by the decree removed, with all the rights, estates, powers and duties conveyed to, or imposed upon the latter by the deed;

That a large amount of debts were due by said company, which were entitled to be paid out of the property conveyed by the deed of trust;

That 80 per cent. of the amount of each share of stock of the company remained unpaid by the persons liable to pay the same, which had never been called or required to be paid by the company, yet remained liable to be called for to pay the debts of said company;

That it was necessary to make a call of 30 per cent. of the par value of the stock of the company to pay its debts; under the provisions of the deed of trust, and an assessment of that amount was decreed upon the stock and stockholders of said company and their assigns, to be paid to the said plaintiff as substituted trustee, who was ordered to proceed to collect the same by such measures as he might be advised; that plaintiff duly qualified as trustee under said decree, and became entitled to all the rights of the former trustees, and to collect said assessment. The declaration then asserts the liability of defendant to pay the assessment of $30 per share upon the 250 shares

subscribed for by him. See Record, pages 4, 5 and 6, for declaration.

The first plea of the defendant admits that he subscribed for the 250 shares, and that certificates for the same were issued to him, but avers that in fact he subscribed for a part of said shares for other persons, and that he made that fact known to the company and its agents, and that the shares were issued in his name, and he was entered on the books of the company as the holder of them, only as a matter of convenience—that when the certificates were issued to him he transferred part of the stock to the other persons for whom it was intended, and that it was the intention that the transferees should complete such transfer to their own names on the books of the company, but that defendant did not know whether they had done so or not. Defendant claimed that by reason of the promises he was only liable, if at all, for 50 shares of said 250 shares subscribed for by him.

The second plea avers that the plaintiff is not the proper person to maintain this action.

The third plea avers that the plaintiff has accepted 25 per cent. of the par value of their shares from other stockholders, and that defendant is not liable for any greater amount.

The fourth plea is that the cause of action did not accrue within three years before the institution of the suit.

The evidence offered by the plaintiff showed that the defendant was a subscriber for 250 shares of stock, for which five certificates had been issued to him for 50 shares each, upon which he was credited with $1,250 as paid, and that on the 5th of February, 1866, one of these certificates, No. 302, had been transferred on the books of the company, and in lieu of it five new certificates issued for 10 shares each to five persons named, leaving the other five certificates standing in defendant's name on the books of the company.

A duly certified copy of the record of the suit in the Chancery Court of the city of Richmond, in which the decree mentioned in the complaint was made, was offered in evidence without exception on the part of the defendant.

The evidence on the part of the defendant showed substan-

tially the same thing as to his holding of stock, except that when he received the five certificates sent to him, made out in his own name, he transferred one of them to each of the three persons for whom he alleged that he had taken them, but that only one of the five certificates had been transferred on the books of the company.

Upon this state of the pleadings and proof, the plaintiff asked the Court to instruct the jury to find a verdict in his favor, which the Court refused to do, but instructed the jury that if they believed the evidence they should find for the plaintiff, which they did.

The case is here on the exception of the defendant to the instruction given by the Court.

The instruction does not define the amount of the recovery, and is silent on the subject of the amount of interest to which the plaintiff would be entitled if the jury should find for him. The complainant claims interest on the assessment "until paid," without stating from what date interest is claimed.

It would seem, under these circumstances, that the *amount* of the judgment, so far as interest is concerned, is not a question presented by the exception. If the verdict was excessive as to the interest allowed, a motion for a new trial would seem to have been the proper remedy.

But even if the exception be regarded as raising the question as to the amount of interest, there was no error, as we think will be shown hereafter.

By stipulation of counsel the Record contains only so much of the record of the case in the Chancery Court of the city of Richmond as was considered material to the questions before the Court, with leave to either party to refer to the full transcript of the said Chancery Record. See stipulation, page 72.

Before discussing the questions presented by the exceptions, we call the attention of the Court to certain provisions of the law of Virginia applicable to the corporation, which differ materially from the general law regulating such bodies, and the obligations of their members or stockholders.

By the Code of Virginia of 1860, title 18, ch. 57, sec. 24, (in

force when the corporation was formed, and yet in force—see Code of 1873, title 18, ch. 57, sec. 26,) it is enacted: "No stock shall be assigned on the books without the consent of the company, until all the money which has become payable thereon shall have been paid, *and on any assignment* the assignee and assignor shall each be liable for any installment which may have accrued, or which may thereafter accrue, and may be proceeded against in the manner before provided."

This provision has been interpreted by the Court of Appeals of Maryland, by the Supreme Court of Alabama, and finally by the Supreme Court of Virginia, to mean, that notwithstanding the assignment of shares on the books of the company, whether the assignor be an original subscriber, or himself only a stockholder by assignment, he, as well as his assignee, is liable for installments on the shares which may accrue after assignment.

McKim vs. Glenn, Trustee, 66 Md. 479.
Morris vs. Glenn, 13 Va. Law J. No. 11, page 224.
Hambleton vs. Glenn, 13 Va. Law J. No. 12, page 242.
See also Glenn vs. Scott, 28 Fed. Rep. No. 15, page 804.

This statute so interpreted would seem to dispose of the the question of the liability of the defendant below to the full amount of his subscription.

It will be observed that the defendant claims to have subscribed for 150 shares for three other persons, viz., Jonathan M. Heck, K. P. Battle and B. P. Williamson. He says that three certificates of 50 shares each in *his* name, but intended to be assigned to the above named persons, were sent to him and by him transferred to each of them. The remaining 100 shares he says he took in his own name, intending, however, to transfer 50 of them to certain persons who he expected would take them.

Now the stock ledger shows (page 14), that five certificates of 50 shares each were sent to defendant, Nos. 299, 300, 301, 302, 303. Three of these five certificates for 50 shares were intended for and transferred to Heck, Battle and Williamson,

as defendant alleges, though they failed to have them transferred to their own names on the books of the company. Of the remaining 100 shares defendant admits that he retained 50 shares for himself and transferred the other 50 to five other persons whose names appear in the extract from defendant's account in the stock ledger.

These 50 shares therefore, thus distributed by defendant, were part of his own, which, to use his own language, he took, "*supposing that he knew of parties who would take the other fifty of said one hundred.*"

As to these 50 shares so assigned and represented originally by certificate No. 302 in defendant's name, they were divided into five certificates of ten shares each, and actually transferred on the books of the company to M. Bowes, George R. Waterhouse, B. P. Williamson, R. H. Battle, Jr., and William E. Anderson. (Page 14.)

As to these shares, therefore, the plaintiff was original holder on his own account, and subsequently assigned them, not as agent of the assignees, but as original owner.

He therefore as to these shares is an assignee as well as an original subscriber, and comes clearly under the operation of the statute above quoted, as construed by the authorities cited.

As to the three certificates issued to defendant, as he says, to be transferred to Heck, Battle and Williamson, but which yet remain on the books of the company in the name of the defendant, it is submitted that even admitting all that the defendant claims as to the object and purpose of his subscription for these shares, he must be dealt with, in this case, as the owner.

The Code of Virginia of 1860, title 18, ch. 57, sec. 25, provides as follows:

"A person in whose name stock stands on the books of a company shall be deemed the owner thereof as regards the company."

See also Code of 1873, title 18, ch. 57, sec. 27.

Even admitting that if the defendant has subscribed as agent of disclosed principals, and has afterwards perfected the trans-

action by causing the names of those principals to be accepted by the company instead of his own on the books as shareholders, admitting, we say, that such an act would have relieved the defendant from the statutory obligation imposed on the *assignor* of the stock, and even admitting that under the circumstances stated by defendant the company itself could not have held him liable on those shares (which we by no means admit in fact), yet under the statute above quoted, as well as the well settled rules of law, as far as the rights of creditors are concerned, he in whose name the stock stands is responsible. The defendant had it in his power to have compelled his alleged principals to substitute their names for his on the books Failing to do so, and remaining ostensibly a shareholder, he cannot, nor could the company by any agreement with him, defeat the rights of creditors.

McKim vs. Glenn, 66 Md. 483–4.
Pullman vs. Upton, 96 U. S. 328.
Allibone vs. Hager, 48 Pa. State, 48.

Even supposing that the company agreed to accept his principals, in his stead, the company was in no default if those principals neglected or refused to take defendant's place. His failure to produce his alleged principals could not discharge him.

This view is strengthened by section 27 of the same article of the Code of Virginia, 1860, which gives the assignee of a certificate of stock, not transferred to his own name, complete legal and equitable rights to the stock *as between him and his assignor*, but "*subject to the provisions of the 26th section*," (that cited above).

Even if Hawkins had been registered as a stockholder by fraud, instead of by his own consent, and claimed to be relieved on that account, it was incumbent on him, knowing all the facts, to act with the utmost diligence and promptitude.

Upton vs. Tribilcock, 91 U. S., page 55, and cases cited.

We submit, therefore, that if the defendant be liable at all, he is liable to the full extent of the stock that he subscribed

for, and that stood, or had stood in his name on the books of the company.

We pass to consider the effect of the decree of the Chancery Court of the city of Richmond, and in that connection we invite the attention of the Court to the provisions of the law of Virginia applicable to the case. Whatever may be the general law applicable to corporations that abandon their franchises, and cease to transact business; and whatever effect such action on the part of a corporation may have on its rights to sue and to be sued, for the purpose of realizing its assets and paying its debts, there is no doubt as to what the law of this corporation is.

The Code of 1873, ch. 56, sec. 31, (taken from Act of 1836–7, p. 46, ch. 68, sec. 6, and re-enacted from Code of 1860, ch. 56, sec. 31,) provides, that—

"When any corporation shall expire or be dissolved, or its corporate rights or privileges shall have ceased, all its works and property, and debts due it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; and such corporation *may sue and be sued as before*, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities, and distributing the proceeds of its works, property and debts among those entitled thereto."

This statute has been construed by the Court of Appeals of Virginia to warrant the proceedings in the Chancery Court of the city of Richmond, above referred to, and the making by that Court of the call or assessment sued for in this case, as if the company had not abandoned the exercise of its franchise.

Lewis, admr. vs. Glenn, 6 S. E. Rep. No. 11, page 860.

The right of the company to sue and be sued *as before*, for the purpose of "collecting debts due to it, prosecuting rights under previous contracts with it, &c." seems to remain the same after it ceases to prosecute its business *as before*.

In other words, it is held that even after this company ceased

to prosecute its business as an express company, it continued to have all the powers and rights of "a going concern," so far as necessary to pay its debts. And this was expressly ruled by the Court of Appeals of Virginia in passing upon this provision of the Code.

See Hambleton vs. Glenn, &c., 13 Va. L. Journal, No. 12, page 242.

If the power to sue continued for the purposes named, the power to do any corporate act necessary to enable the company to sue, also remained. This would seem to be a complete answer to the argument on the part of the plaintiff in error, based on the assumption that after the assignment made by the company on the 20th September, 1866, mentioned in the complaint, the president and directors of the company "lost all power to pass upon calls."

In Allibone vs. Hager, 46 Pa. State, 48, the Court, in passing upon the plea of the statute of limitations, says:

"A third defence is the statute of limitations—that is to say, it is contended that inasmuch as the company have not once in eleven years called in the balance of the stock, the statute would be a bar to its recovery from the stockholders. This by no means follows. The principle which ruled the cases of McCully vs. Pittsburgh, &c., 8 Casey, 25, (and other cases), is not developed in this case.

"In these cases, by analogy to the statute, it was held that when the work had not been prosecuted according to the requirements of the act of incorporation, and no calls made since the date of subscription for payments on account of stock, a presumption of abandonment of the project arose in favor of the subscriber, and that six years was a bar to the remedy by call and to a suit to recover the installments so called for. Here the special verdict finds no facts whatever to bring the case in hand within these principles. We have therefore the case of subscriptions not paid up, but held in reserve by the company, to be drawn upon as needed."

It was held accordingly that the statute did not apply.

Now it is submitted that the statute of Virginia, above cited,

has the effect of the special verdict referred to by the Court in the case in 46 Pa. State Reports.

It prevents any presumption of the loss of power by the company to make a call by expressly construing its rights to sue on contracts made with it to enable it to pay its debts, *as before*, after it has ceased to prosecute its work.

Before considering the Virginia decree it will be found useful to examine briefly the history of the case as disclosed by the Record.

The National Express and Transportation Company was formed in September, 1865, having for its object to conduct an extensive express business throughout the United States, which should give employment to the officers and men of both armies, then lately disbanded.

The preliminary organization continued until it became incorporated by an Act of the Legislature of Virginia, passed on the 12th December, 1865. See Record, page 62, &c.

The authorized capital was five millions of dollars, which might be increased to ten millions. The shares were to be of the par value of $100 each. Of the authorized capital 40,044 shares were subscribed for, making $4,004,400. See Record, page 44.

The company began business, but by the rivalry of other companies and bad management it became embarrassed, and on the 20th of September, 1866, executed the deed of trust, mentioned in the complaint, to Hoge, Kelly and O'Donnell, for the benefit of its creditors, which will be found on page 24, &c., of Record. The deed shows on its face that it was made in the expectation that the company would be able to extricate itself from its embarrassments and resume active operations, and the expectation would appear to have been warranted by its condition at the time.

The stipulation of counsel authorizes either side to use the printed Record of the Richmond suit, and for the convenience of the Court we here insert parts of that Record bearing upon the history of this case.

At page 96 of the Richmond Record will be found the pro-

ceedings of a meeting of stockholders, held on the 29th and 30th of October, 1866.

Exhibit "Richmond Whig," with Dep'n of J. E. Brister, Page 119.

NATIONAL EXPRESS & TRANSPORTATION COMPANY.

A meeting of the stockholders of this company was held on Monday evening at the Exchange Hotel. On motion, Mr. Peachy R. Grattan was called to the chair.

Mr. Kelly, from the committee appointed to confer with the Merchants' Union Express Company, New York, made a report of the result of said negotiation, and read a communication showing that the proposition to that company to purchase the preferred stock of the National Express and Transportation Company was not acceded to.

Gen. Anderson moved that a committee of five be appointed to report a plan for the reorganization of the company; said report to be presented at a meeting to be held the following morning.

The chairman appointed the following committee: Lewis V. Bogy, of St. Louis; John B. Miner, of Charlottesville; Thomas J. Michie, of Staunton; M. G. Harman, of Staunton, and Gen. Joseph R. Anderson, of Richmond.

Mr. Bogy moved that Wm. H. Perot, of Baltimore, be telegraghed to, and asked whether he would accept the presidency of the company. This motion was adopted unanimously. Mr. Bogy spoke very highly of Mr. Perot, as a gentleman of high reputation, large means, and anxious for the success of the company. Mr. Bogy suggested $2,500 as a salary, but, at the same time, remarked that he knew Mr. Perot, if he accepted the office, would not care much about the amount of salary.

On motion of Gen. Anderson, the meeting adjourned to next morning at 11 o'cloek.

Adjourned Meeting.

The stockholders reassembled yesterday morning, and the committee appointed by the previous meeting made an elabor-

ate report, through its chairman, Mr. Bogy, on the subject of reorganization. From this report we find that

557 shares had been taken, on which nothing has been paid.
1,154 shares on which 1 per cent. has been paid and no certificate issued.

2,169	shares	on	which	5	per	cent.	have been paid.
20	"	"		7½	"	"	"
8,087	"	"		10	"	"	"
25	"	"		11	"	"	"
20	"	"		12½	"	"	"
250	"	"		13	"	"	"
12,554	"	"		15	"	"	"
20	"	"		15½	"	"	"
15,188	"	"		20	"	"	"

40,044 total amount of shares.

The company has collected from its stockholders in cash,	$534,748
From the same parties, in notes, which are considered good,	54,436
	$589,184
Indebtedness of every description,	273,000
	$862,184

Assets.

The company has, in wagons, horses, harness, books, stationery, safes and office fixtures, the sum of	$235,120	81
In bills receivable as above mentioned,	54,436	00
Total,	$289,556	81
Thus leaving a loss of	$572,627	19

There is due the company by stockholders as delinquents—and this based only on the 36,440 shares of the stock on which 10 per cent. and upwards has been paid—the sum of $145,855 will pay up the stock to 20 per cent., and the report proposes

that an additional call of 10 per cent. be made, based on these 36,440 shares, which would give the sum of $361,440.

The cash means would then be:

Already due,	$145,855
Proposed call of 10 per cent. on 36,440 shares,	361,440
Total,	$507,295
Which, added to the amount of assets on hand, would make a total of	$796,851 81

The report goes on to say that if the stockholders pay up as proposed in it, the condition of the company would be as follows:

Amount due on previous calls,	$145,855
Amount for proposed calls,	361,440
	$507,295
Less the debts,	273,000
	$234,295

Leaving the sum of $234,295 on hand, besides the property, to carry on the business, which the company say they deem ample, provided the administration of affairs of the company be able and economical. (This is but a brief abstract of the report, which is quite lengthy.)

The following resolutions, drawn up by the committee, were then read:

Resolved, That this meeting sees nothing in the present condition or future prospects of this company to induce despair of the ultimate success of our enterprise.

2. That, with a fund of subscribed stock, yet untouched, in the hands of solvent shareholders, amounting to upwards of $3,000,000, of which less than one-tenth will discharge all our liabilities, and less than one-fifth will enable the company to proceed prosperously with its operations, insolvency is absurd, and failure to succeed wholly unnecessary.

3. That to pay the debts, and resuscitate the credit of the company is the first duty and purpose of the stockholders, to

which end every shareholder is already pledged and bound by law to the full extent of the stock owned or subscribed by him.

4. That this meeting being satisfied that thirty per cent. of the stock at present subscribed will suffice to pay the debts and prosecute the business of the company successfully, would now, if it possessed the legal power, reduce and consolidate the stock by reducing the number of shares to three-tenths of the orignal amount; but that being impracticable without an amendment of the charter, the stockholders here present pledge themselves, and hereby instruct the president and directors to endeavor to obtain such amendment from the General Assembly of Virginia as soon as it shall again be convened in December next.

5. That in addition to the requisitions heretofore made, amounting in the aggregate to twenty per cent., the president and directors be instructed forthwith to make a further requisition of ten per cent. upon the stockholders—five per cent. payable within thirty days, and five per cent. within ninety days—and that they proceed, without delay, to enforce payment from all delinquents by the promptest and surest process of law.

6. That the president and directors be advised to suspend the active operations of the company, taking due care of all its property until the stockholders shall have responded to the requisitions upon them as to supply a fund sufficient to pay the debts and extend the business without further embarrassment.

7. That the creditors have in the obligation, willingness and ability of the stockholders to pay with honorable promptitude the debts respectively due, the amplest security therefor. They are respectfully appealed to to forbear such proceedings as can only tend to delay, embarrass and injure the company, without, in any wise, hastening that result of the speedy liquidation which the stockholders desire and aim at not less earnestly than themselves.

8. That the stockholders now present address themselves with confidence to their fellow-stockholders urgently, but most respectfully, reminding them that they cannot, and ought not,

to seek to evade responsibility for the debts already incurred, and that in justice to all concerned, the commercial enterprise on which we entered, so needful as it is to the business of the country, and of which we esteem the future success already assured, cannot be abandoned without eminent discredit. They therefore trust that each stockholder, for his own sake, and for the sake of the company, will respond promptly and fully to the calls made upon him.

9. That the president and directors be specially instructed to cause the interests and rights of the company, now in litigation in Alexandria, Baltimore and New York, or elsewhere, to be diligently cared for and protected.

10. That as soon as the debts of the company shall be paid, or satisfactorily arranged, the business shall be gradually resumed, as fast and as far as circumstances shall allow, and, at all events, in season for spring trade.

11. That the president and directors be requested to apply to the General Assembly of Virginia as soon as it shall convene, in December next, for an amendment to the charter, reducing the capital of the company to a minimum of $1,000,000, with power to increase it to $2,000,000, and limiting the liability of the stockholders upon their raising subscriptions to forty per cent. thereof.

12. That it shall be an invariable rule, from which the president, directors and superintendents are specially charged, to allow no departure, that all the employees of this company, who receive or disburse money, shall execute and file with the secretary, before entering upon their offices, bonds in adequate penalties, and with sufficient security, to be renewed from time to time, as occasion requires, for the faithful discharge of their duties.

13. That the utmost energy and promptness on the part of all officers and employees of the company, with a pervading spirit of economy, are deemed necessary to success; and therefore we recommend to the board great vigilance in this regard.

Gen. Anderson then offered the following resolution, which was adopted:

Resolved, That the report of the committee be adopted, with

the following modifications, viz.: Whereas, this meeting is fully satisfied that the payment of thirty per cent., as indicated in the report, is sufficient to carry on the business of the company, yet, as a matter of precaution, this meeting recommend, that when consolidation is effected by amendment to the present charter, it be based on forty per cent., and entire release of the remaining sixty per cent.; this additional ten per cent. to be called or not, as the exigencies of the company may arise, and not to be called on unless the same be necessary.

On motion of Mr. Michie, it was

Resolved, That the president of the company is hereby instructed to lay before the Hon. J. C. Underwood, judge of the Eastern District of Virginia, the proceedings of this meeting.

The stockholders then proceeded to make nominations for a board of directors, when the following gentlemen were nominated and unanimously approved of:

W. H. Perot, Baltimore.
E. J. Foley, Baltimore.
Wm. Devries, Baltimore.
Joseph R. Anderson, Richmond.
Wm. H. Webb, New York.
J. Carter Marbury, Washington.
R. P. Zimmerman, Atlanta.
M. G. Harman, Staunton.
Lorenzo Norvell, Lynchburg.

On motion of Gen. Imboden, it was

Resolved, That the report of the committee and proceedings be published in the city papers, and that the secretary have five hundred copies published in pamphlet form, and send one to each stockholder without delay.

The meeting then adjourned *sine die*.

In the course of the proceedings reference was made more than once to the secretary, Mr. J. V. H. Allen, and to the general superintendent, Mr. John J. Kelly, (formerly of Wells, Fargo & Co.'s Express,) in terms highly complimentary for their efficiency, and the ready and satisfactory manner in which

they answered all questions put to them in connection with their departments, and it appeared to be the universal wish of the meeting that they should be continued in office.

Examined and found correct.

O. G. KEAN, Comm'r.

The proceedings above quoted make it quite plain that the company executed its deed of trust as a temporary expedient, expecting to resume its business. They all took place after the execution of the deed of trust.

It will be seen that of the large subscribed capital of the company, of nearly four millions of dollars, only $871,120 has been called for, of which $589,184 has been paid in cash or notes, and $281,936 remained unpaid. The total indebtedness at the time, including estimated indebtedness, to November 1, 1866, was $350,000, all of which could have been readily discharged by the assessment of 10 per cent., recommended by the stockholders to be made, but never made by the board.

The proceedings above quoted were the last acts of the stockholders of the company.

Its large capital was left almost untouched, and a large number of most meritorious creditors were left unpaid.

The resolutions adopted show that in the opinion of the stockholders at least the deed of September 20, 1866, did not put an end to the active life of the compary or impair its power to make calls on its members, and is wholly inconsistent with the view taken by the counsel of plaintiff in error as to these matters.

The Richmond Record further shows that immediately upon the execution of the deed of trust, the trustees became involved in litigation with creditors and with stockholders in many states. See opinion of Court, Record, page 64; see also the joint and several answers of Hoge vs. Kelly, beginning at page 49 of this Record, particularly pages 50, 51 and 54.

From these answers it will be seen that soon after the execution of the deed of trust a Court in Maryland declared the deed void, and appointed a receiver of the company, who had

possession of all the books and papers until the decree was reversed by the Court of Appeals of that State.

The Maryland decree was before the Chancery Court, and is referred to in its opinion at page 66, and will be found in 28 Md., page 287.

From that report it will be seen that the decree of the Circuit Court of Baltimore city declaring the deed of trust void, and appointing the late Governor Pratt, of Maryland, receiver, was not reversed until 1868, and in the meantime the trustees were enjoined from acting under the deed.

It further appears from the answers of Hoge and Kelly, pages 50–51, that in some of the suits mentioned the trustees had been enjoined from acting under the deed, but the attention of the Court is called particularly to the fact that even when that answer was filed, shortly before the rendition of the decree of December 14, 1880, there was then in effect an injunction issued by the Supreme Court of New York, at the suit of a stockholder, who sued on behalf of himself and all other stockholders, enjoining both the company and the trustees from collecting any debts whatever due the company in that State. Record, page 55.

It also appears from the same answer that from the time the books and papers of the company were restored to the trustees upon the decision of the Court of Appeals of Maryland, in 28 Md. 287, above referred to, they remained in the custody of Kelly, in the city of New York, who denied access to them to all creditors of the company, and to all others, except the attorney and counsel of the trustees in New York, and the attorney and counsel of the company itself. Record, page 54.

By the charter of the company, its principal office was in Richmond, and it was there that creditors and stockholders had a right to look for the books and papers of the company, and yet these books and papers were removed from the proper place of custody, and kept in New York, all access to them being denied by the trustee to everybody except the representatives of the company.

For the convenience of the Court we print here the deposition of Kelly, one of the trustees, taken from the Richmond

Record, page 90, &c., from which it will be seen that the creditors only obtained access to the books by the consent of Kelly at the time he testified, April 26, 1880.

It is needless to say that without these books it was absolutely impossible to obtain the information necessary to enable the Court to levy an assessment, or to ascertain who were the stockholders of the company.

Depositions were continued pursuant to adjournment, as follows:

Present. John Howard, Esq., p. q.

John J. Kelly, a witness of lawful age, deposeth and saith as follows, having been first duly sworn:

1st quest. by Mr. Howard, p. q. What is your residence and occupation?

Answer. I am a manufacturer of straw goods, and reside in New York City.

2nd by same. Where did you reside in 1866?

Answer. Part of the time in Richmond, part of the time in Baltimore.

3rd by same. State what connection you had, if any, with deft., the National Express & Transportation Co., during that time, and what opportunities you had of knowing its business and the officers and agents who conducted it.

Answer. I was first general auditor of the Co., subsequently a director and vice-president, and for the remainder of my term with them general superintendent. In all of these capacities I was familiar with the affairs of the Co. and with its officers and agents, books and accounts.

4th by same. Where have you subsequently resided?

Answer. In the city of New York.

5th by same. State about what time the Co. failed and ceased its operations.

Answer. I think the active operations of the Co. were closed up in November or December of 1866. Its various offices were closed as rapidly after that as possible.

6th by same. What connection, if any, did you have with

the assets of the Co., after its failure, and in what capacity; and what action did you take in the matter, if any?

Answer. I was one of three trustees, to whom the Co., by a deed of trust dated Sept. 20th, 1866, (and mentioned in the papers of the case) assigned its affairs. The deed was not delivered to us, according to its provisions, until some time later, when we took charge of the affairs of the Co. My co-trustees were John Blair Hoge and C. Oliver O'Donnell, then both of Baltimore. Mr. O'Donnell has since died, but he never took any active part in the matter. Mr. Hoge is now in W. Va. I was the most active in the matter, but consulted Mr. Hoge. We met from the start with difficulties in the way of attachment suits and otherwise, and even before the deed of trust became operative, by recording it at the various points necessary, the larger part of the personalty of the Co., in fact all its personalty, was seized in such suits, and never came into our possession. We made efforts everywhere to realize the personal property of the company, but without the slightest sort of success. We were met with serious law proceedings in Maryland, where the affairs of the company were taken out of our hands and put in those of a receiver, and by a suit in New York, by which we were enjoined from doing anything further in the matter. The trustees have been without funds either to prosecute or defend these litigations, and the trust has consequently been permitted to lie without action. It should be added, however, that the trustees did defend the proceedings in Maryland, and the receiver there was removed, and the affairs of the Co. returned to our hands.

7th by same. What part, if any, of the assessments, made by the company upon the stockholders before it failed, were collected by you and your co-trustees; and what effort did you make to collect them?

Answer. I have no recollection of any collection on account of assessments on stock. All our efforts were delayed, as previously stated, and finally stopped by the injunction proceeding in New York.

8th by same. State whether or not the Co. received any notes

from stockholders on account of said assessments; and if so, what became of them?

Answer. I think there were notes and obligations from Ficklin used as collateral to raise money on at some time during the existence of the Co. The Co. sometimes drew on various stockholders for amount of their assessments and deposited the drafts with its endorsement, as collateral for loans, or sent them through the bank for collection. In every case the Co. was the debtor, so far as the bank was concerned. This was particularly the case towards the close of the operations of the Co., when drafts for a large part of their last assessment were made upon the stockholders, and those drafts used to obtain money from the Bank of Commerce, with which the drafts were deposited.

9th by same. State, if you know, whether or not, a great many of the stockholders of the Co. have become insolvent.

Answer. I only know one or two instances, in my own knowledge, in New York city. I am informed that very many of them have become insolvent.

10th by same. What percentage of assessment had been made when the Co. ceased business?

Answer. In all, twenty per cent.

11th by same. What became of the books and papers of the Co., on its failure, and in whose custody and where have they been since?

Answer. The books and papers came into the possession of the trustees in Baltimore, were taken from them by the order of a local court in Maryland and placed in the hands of Thomas G. Pratt, as receiver, and subsequently, after his receivership had been vacated, they came into my possession, and I have had them in the city of New York ever since.

12th by same. Have you any of those books here present; and if so, state what they are, and so describe them as that they can be identified; and state also, if you know, in whose handwriting they severally are?

Answer. I have some of the books here, having brought them from New York at the call of counsel for the plaintiff; and will leave them in the commissioner's possession, that he may examine them thoroughly, and make such extracts as may

be necessary, with the understanding, however, that when they have been so examined and extracts made, they are to be returned to me in New York. I do not feel authorized to surrender them absolutely."

In this state of affairs W. W. Glenn, having obtained a judgment in the Superior Court of Baltimore city against the company for $42,431.31, on the 8th of June, 1869, filed a creditor's bill in the Chancery Court of the city of Richmond against the National Express and Transportation Company, its president and directors and the trustees named in the deed of trust. The bill sets forth that the trustees had collected little or nothing under the deed; that the visible property of the company had been seized by creditors in various States, and that little or none of it had come to the possession of the trustees; that only 20 per cent. had been called in from its stockholders, of which the trustees had collected but little, and that much of what had been called had been lost by lapse of time; that the right of the trustees to act under the deed, and its validity and legal effect had been drawn in question in the Courts of various States, and their operations thus hindered; that it would be necessary to resort to the remainder of the subscription to pay the debts of the company, and that by the terms of the subscription, stockholders could not be sued until a call had been made by the company; that doubts had been expressed, whether the uncalled subscription passed by the terms of the deed, and if they did not, the trustees could not sue for them; that if they did pass, the trustees could not sue for them without a call upon the stockholders, and that there was danger that they might be sacrificed in a struggle among creditors for priority; that many of the creditors were creditors for small sums and too poor to undertake such litigation, and that equity demanded that the money should be collected by an equal assessment upon all its stockholders.

The bill prayed that the Court would pass upon, and construe the deed of trust and decide as to its validity and as to what passed by it to the trustees, and that to avoid the loss of the unpaid subscription by lapse of time, pending the proceedings, a receiver should be appointed with power to sue for and

collect all money due the company, and to reduce any property it had to money and to collect further calls on the stockholders as soon as such calls should be made, the money to be brought into Court to await its further order. It asks for an account from the trustees, for the ascertainment of the debts of the company, and the amount necessary to be assessed upon the stockholders for the purpose of paying the debts, whether under the terms of the deed or independently thereof, according as the Court should decide as to the legal effect of the deed in passing the subscription remaining uncalled for at the time the deed was executed. It does not ask the Court to make an assesment, but it contemplated that the company would come into Court and that its president and directors would make assessments necessary to pay the debts of the company as ascertained by the Court.

The bill contained the prayer for general relief. Its object was, as it appears upon its face, to avoid the consequences of further delay in enforcing the deed of trust arising out of the contention as to its validity, and as to its legal effect, to which reference has been made above, by obtaining the judicial construction of the deed by a Court of the domicile of the company, it being assumed that so far as the deed conveyed personal property, whatever effect it might be decided to have by such a Court, it would be allowed to have in the Courts of other States in which it might be drawn iu question, and that in the meantime, measures should be taken through the instrumentality of a receiver to collect and reduce to money all the property of the company, including such further calls upon the stockholders of the company itself might make for the purpose of paying its debts. Although process was prayed against the company as well as against its officers and trustees, no process actually issued against the company itself at the filing of the bill. But it is submitted that as the bill prayed process against the company, the suit was actually instituted against it from the time the suit was docketed. See Purcell vs. Blennarhassett, 3 Jones and Latouche 45; P. W. & B. R. Co. vs. Howard, 13 How. 332.

The subpœna was returned executed, as to two directors,

the president and most of the other officers not residing within the jurisdiction. This bill, as has been stated, contemplated the appearance and co-operation of the company, but nothing further was done in the case (the withholding of the books rendering it impossible to do anything), until August 4th, 1879, when an amended and supplemental bill was filed. The original bill will be found beginning at page 17 of the Record, and the amended and supplemental bill beginning on page 27. This amended and supplemental bill charges that neither the company nor the trustees had done anything, or taken any measures to execute the deed of trust or to pay the creditors; but that they had neglected and refused so to do. It prays that the trustees be removed and a new trustee appointed, and that if the company shall make no assessment upon the stockholders to pay its creditors, the Court will make one, and provide for its collection.

It charges that the books of the company had been retained by John J. Kelly, one of the trustees, who had refused to submit them to the creditors of the company; that Hoge and Kelly are non-residents of the State; that O'Donnell, the other trustee, had died, he having been also a non-resident, and that the corporation had long since ceased to exercise its franchises. It prays that an account may be taken of the debts of the company and of its assets, and that a new trustee be appointed, and that the Court shall proceed to call upon the stockholders for such amount of the uncalled subscription as may be necessary to pay the debts, and authorize the same to be collected either by a receiver to be appointed by the Court or by a new trustee under the deed of trust, if the uncalled for subscription passed by the deed. It then prays that the National Express and Transportation Company, and the officers of the company named in the bill, and the surviving trustees, shall be required to answer the amended and supplemental bill.

No question is raised here as to the sufficiency of the service of process on the company, or that the Court acquired jurisdiction over the company, but so far as actual notice to stockholders of the pendency of the proceedings is concerned, as that fact may have some bearing upon the questions before the

Court, we call attention to the fact that a director was served with process, appeared and answered, he being also a stockholder; the subpœna against the company was published in a daily paper in Richmond, once a week for four weeks, and posted at the Court House door, and the object of the suit was published once a week for four successive weeks in a daily paper in Richmond. (Record, pages 38, 39 and 40.) The company, failing to appear, a decree *pro confesso* was taken against it in due course on the last Monday in September, 1879, and on the 6th of October following, an interlocutory order was passed, referring the case to one of the commissioners of the Court, to take an account of the debts due by the company, and the priorities thereof, and an account of its assets, and to report to the Court specially any matters deemed pertinent by him, or which he might be required to state by any of the parties, with authority to examine any party to the cause, and to call for any books and papers of the defendant company.

It was further ordered that the commissioner should give notice by publication in a daily paper once a week, for four successive weeks, of the time and place of taking the accounts required by the order to be taken, and that such publication should be taken as personal service on the parties to the cause. Thus actual notice of the proceedings was again given, to all persons interested, in the only available way.

The commissioner complied with this order. Record, pages 40, 41 and 42.

Sundry creditors became parties to the suit, and the commissioner made his report, beginning at page 42 Record. The first part of the report ascertains the grand total of indebtedness, including interest to June 1, 1880, to be $509,392.41; the second part shows the whole amount of unpaid stock to be $3,203,520, and recommends an assessment of 20 per cent.

By a supplemental report of the commissioner (page 57) an increase of the assessment was recommended, and the decree of December 14, 1880, was passed, after the first report had remained in Court from June 19, and the final report from December 8.

The decree conclusively establishes the following propo-

sitions of law and fact, as against all persons who are bound by it:

1st. That the deed of trust is valid under the laws of Virginia.

2d. That the deed passed to the trustees the money remaining unpaid and uncalled for in the hands of the stockholders, but not the right to make calls or to sue for the money until a call should be made by the company, or in its default by the Court, and that the power to make calls and the duty to make them in aid of the deed of trust remained with the company after the deed was executed.

3d. That the preferences provided for in the deed are legal and valid according to the laws of Virginia.

4th. That a large amount of money was due by the company to various creditors named in the deed whose claims are established by the decree as against the company, and as against the trust fund provided by the deed.

5th. That there was no property to pay the debts secured by the deed of trust, except the 80 per cent. of the capital stock that had never been called for by the company at the time of the execution of the deed of trust.

6th. That to pay the debts established by the decree, it was necessary that a call should be made upon the stockholders of the company to pay 30 per cent. of the amount of their subscription, which had not been called for at the time of the execution of the deed.

7th. That the company had not made any call, but had wholly neglected so to do, and that the trustees under the deed had no power to make such a call, and no right to sue for any part of the unpaid stock, unless and until a call should first be made upon the stockholders to pay the same.

8th. That the company having failed to make such a call, the Court, upon consideration of the amount of indebtedness to be paid and of the amount of unpaid stock, decreed a call or assessment of 30 per cent. of the unpaid stock, and directed and required the stockholders and all persons liable to pay the same, to pay it to the plaintiff, who was by the decree ap-

pointed trustee in the room of the surviving trustees under the deed of trust of September 20th, 1866, and invested with all their rights and powers and subjected to all their duties and obligations, with full power to the plaintiff as such substituted trustee, to take such proceedings as he might be advised, to collect the said assessment of 30 per cent. of said capital stock.

It is upon this decree that the right of the plaintiff in error, to recover, is based. The parties to the suit were, the creditors as complainants, the company as a defendant, and the trustees under the deed of trust of the 20th of September, 1866, who appeared and answered voluntarily, as will be seen by reference to pages 162 and 170 of the Record. These answers were filed before the decree, as it appears by the decree, page 145 of the Record.

The object of the bill was to enforce the provisions of the deed of trust of September 20th, 1866, in favor of the creditors of the company. The Court had before it the creditors who were the beneficiaries of the deed, the company which is the grantor in the deed, and the trustees to whom the deed was made. It therefore had before it all the parties necessary to be before it, to enable it to make the decree. If it be said that the National Express and Transportation Company had ceased to do business for many years before the decree, the answer is, that under the laws of Virginia it is provided that "when any corporation shall expire, or be dissolved, or its corporate rights and privileges shall have ceased, all its work and property and debts due to it shall be subject to the payment of debts due by it, and then to distribution among the members, according to their respective interests; and such corporation may sue and be sued *as before*, for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, and enforcing its liabilities and distributing the proceeds of its work, property and debts, among those entitled thereto." See Va. Code *ut sup.*

The first question to be considered is whether this decree of the Chancery Court of the city of Richmond was binding upon the stockholders of the company, so far as the unpaid subscription to the capital stock of the company, in their hands,

was concerned. These stockholders were not personally parties to the suit, but it is submitted that so far as corporate property was concerned, so much of it as remained in their hands was as much bound by the decree in the case in which the company was a party, as if it had been paid into the treasury and had been the subject of litigation, between the creditors and the company. This Court decided in the case of the County of Morgan vs. Allen, in 103 U. S. Rep. page 498, that "the capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships; when debts are incurred a contract arises with the creditors, that it shall not be withdrawn or applied otherwise than upon their demand, until such demands are satisfied. The creditors have a lien upon it in Equity; if diverted they may follow it as far as it can be traced and subject it to the payment of their claims, except as against holders who have taken it bona fide for a valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same rights to insist upon its payment as upon the payment of any debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form part of the property and effects of the corporation." (Page 509.) See also Sawyer vs. Hoag, 17 Wall. 610.

In a suit having for its object the payment of corporate debts out of corporate property, it is submitted that the stockholders personally are not necessary parties, or proper parties; they are represented by the company. In the first case reported in which the liability of a stockholder to pay his subscription to stock was determined, the case of Salmon vs. The Hamburg Company, 1st Cases in Chancery, page 20, (S. C. 1 Kyd on Corp., 273,) which has been cited and approved by this Court in Sanger vs. Upton, 91 U. S., page 61, both the corporation and the members of the corporation were made parties. The stockholders demurred on the ground that they ought not to

have been made parties. The decree of the Lord Chancellor dismissed the bill, but upon appeal to the House of Lords, the demurrer of the stockholders was sustained, but the decree dismissing the bill as against the company was reversed, and the cause was remanded with instructions to the Court of Chancery to compel the company to levy an assessment upon its members, and with provisions adequate to enforce such a levy. Thus it will be seen that in the very first case, and one which is the foundation of the exercise of this branch of equity jurisdiction over stockholders of corporations, it was decided that the stockholders were not proper parties, but that the creditors could get relief between themselves and the company only, the stockholders being reached by a decree against the company. In fact by the very terms of the charter of a corporation, the members of it, as to corporate matters and corporate property, consent to sue and be sued, to plead and be impleaded, to contract and and be contracted with *in the name of the corporation.* Such an agreement to be sued, or to receive service of process, binds the party who has made the agreement as effectually as if he had been personally served with process. See ex parte Schollenberger, 96 U. S. R. 374, &c. See also the following cases in which the agreement was held to be binding, and to subject the party to it to judgment as effectually as though he had been personally summoned, although he was not a stockholder in a corporation. Vallee vs. Dumergue, 4 W. H. & G. (4 Exch.) 289. In that case an English subject had become a shareholder in a French company, and by the law of France he had to elect a domicile in France at which he might be notified of all proceedings relative to the company or to himself, and by the same law, proceedings affecting a party not having a domicile in that country, left for him at the domicile of his election, were to be as valid as if left at his real domicile in France. The defendant was sued in a French Court and jurisdiction obtained by leaving process at his elected domicile, although he himself was not in France and was not personally served with process. A suit was brought upon the French judgment against him in England, and the defence was interposed that he had not been served with process. The Court of Exchequer held the plea to be bad, and held that he was

bound by the judgment as effectually as if he had been personally served with process, it appearing upon the face of the proceedings that process had been left at the domicile of his election.

In the case of the Bank of Australasia vs. Harding, 9 M. G. & S. (67 E. C. L.) 660, the Bank of Australia was an unincorporated banking association, and by an Act of the Legislature of New South Wales, the terms of which were accepted by the association, it was provided that the association might sue and be sued, in the name of its chairman for the time being. The Bank of Australia became indebted to the Bank of Australasia in the sum of £175,000, and to recover the amount the Bank of Australasia brought suit in the Supreme Court of New South Wales against the chairman, for the time being, of the Bank of Australia, and recovered judgment. The members of that company were liable as partners, the company being unincorporated, except in so far as the legal capacity of suing and being sued collectively by its chairman. Upon that judgment against the Bank of Australia, the Bank of Australasia brought an action in the Court of Common Pleas in England, (colonial judgments being considered foreign judgments,) to recover the whole amount against Harding, who was a member of the company. Harding set up as his defence that he was not a resident of New South Wales and had not been served with process, and was not a party to the suit in which the judgment had been recovered, had not appeared and had received no notice of the same. But Lord Chief Justice Wilde and the whole Court held that the plea was no defence to the action, and that by becoming a member of the company Harding had dealt with the public upon the terms of the Colonial Act by which the company might sue, or be sued, by its chairman, and that he had assented to the chairman's being considered for all purposes connected with the suit as his representative. The Bank of Australasia brought another suit against one Nias, in the Court of Queen's Bench in England, and the Court declined to hear the counsel for the plaintiff when he proposed to argue the question as to whether the judgment was binding upon Nias; and after argument upon the part of the defendant the Lord Chief Justice Campbell said: "The question is whether the

defendant, being a shareholder in this company, was not virtually present in the colony;" and when the counsel replied that "service on one partner abroad could not be equivalent to service on another partner in England, so as to affect his rights, and that the local Act of the Colonial Legislature only regulated the mode of proceeding against persons resident within the colony, and had no extra territorial affect," the Lord Chief Justice answered "surely it must have been intended that the judgment against the chairman should be available against all members individually." It was finally held by the Court "that the Colonial Act was passed for the benefit of the Bank of Australia, established within the colony, and that the defendant was a shareholder in the bank when the Act was passed, and when the promises were made by the bank on which the action against the chairman was commenced; that the Colonial Legislature clearly had authority to pass an Act regulating the procedure by which the contracts of the bank should be enforced in the colony, nor was there anything at all repugnant to the laws of England or to the principles of natural justice in enacting that actions on such contracts, instead of being brought individually against all the shareholders of the company, should be brought against the chairman whom they have appointed to represent them. A judgment recovered in such an action, we think, has the same effect beyond the territory of the colony that it would have had if the defendant had been personally served with process, and being a party to the Record, the judgment had been personally against him. The Act imposes no new liability upon him but only regulates the mode in which that liability shall be judicially constituted. Any specific remedy upon the judgment which might have existed in the colony, cannot be obtained out of the colony; and unless the judgment may have been made the foundation of an action, it could not, in any manner be rendered available in this country. In recompense for the advantages conferred upon the company by the Act, it provides that the rights of the creditors shall not be prejudiced by it. 71 E. C. L., p. 717. See also 20 Law J. Rep. (N. S.) Q. B. 284, and 4 E. L. and Eq. 252.

These cases came under review in the Court of Exchequer, in Copin vs. Adamson, L. R., 9 Exch. 345. See also Rousillon vs. Rousillon, in L. R., 14 Chancery Div., pages 357 to 371.

This Court decided in the case of Thomas vs. Brownsville R. R. Co., in 109 U. S. R. 522, that in a suit affecting corporate property in which the company and the trustee under a mortgage upon the property of the company were parties, that stockholders had no legal right to interfere in the litigation, and were only allowed to do so by the permission of the Court.

The case of Ogilvie vs. The Knox Ins. Co., 22 How. 387, was a suit brought to enforce the claims of creditors of an insolvent corporation against the stockholders of that corporation in personam, and the company and certain stockholders were made parties defendants. The company, as in this case, did not appear, and a decree pro confesso was taken against it; the stockholders did appear and contested the suit, but the Court in speaking of the effect of the decree pro confesso against the company, say: "The bill was taken pro confesso as against the corporation. The other defendants being corporators, are consequently concluded as to the averments of the bill affecting them. As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors of the corporation for the several amounts due by them; as to them this bill is in the nature of a demand in which they are called on to answer as garnishees of the principal debtor."

It will be observed that in that case, although the stockholders were personally served with process and appeared, they were held concluded as to all averments affecting the corporation and its property, by the decree pro confesso against the corporation.

In Sanger vs. Upton, 91 U. S. R. 58 and 59, this Court says: "The order of the Court (directing the assignee to sue), was conclusive as to the right of the assignee to bring suit. Jurisdiction was given to the District Court by the Bankrupt Act (Rev. Stat., section 4972), to make it. It was not necessary that the stockholders should be before the Court when it was made, any more than that they should have been there

when the decree in bankruptcy was pronounced. That decree gave the jurisdiction and authority to make the order. The plaintiff in error could not in this action question the validity of the decree, and for the same reason could not draw into question the validity of the order; she could not be heard to question either, except by a separate and direct proceeding had for that purpose; she might have applied to the District Court to revoke or modify the order. Had she done so, she would have been entitled to be heard; but it does not appear that any such application was ever made. As a stockholder she was an integral part of the corporation. In the view of the law she was before the Court in all the proceedings touching the body, of which she was a part. In point of fact, stockholders in such cases can hardly be ignorant of the measures taken to reach the effects of the corporation. If they choose to rest supine until cases like this are on trial against them, they must take the consequence. Not having spoken before, they cannot be permitted to speak then, especially to make an objection which looks rather to the embarrassment and delay, than to the right and justice of the case. A different rule would be pregnant with mischief and confusion."

And, in support of this proposition, the Court cites the cases of Hall vs. U. S. Ins. Co., 5 Gill, 484, and Sagory vs. Debois, 3 Sanford's Chan. 510.

The case in 5th Gill was a case in which the authority to institute the suit was derived from a decree of a Court of Chancery, in which the stockholders were not parties, and they disputed the validity of the order directing the receiver to bring the suit against them.

The case of Sanger vs. Upton, was a case in which the corporation had been declared bankrupt, but the jurisdiction of the Bankrupt Court to make the order, under which the assignee brought suit, was not a special jurisdiction conferred upon it by the Bankrupt Law, but was the exercise by the Court in bankruptcy, of the powers of a Court of Equity; and in support of the authority of the Court in bankruptcy to make such an order, this court referred to the exercise of the same power by a Court of Equity in the case in 5th Gill. The

obligation of this decree, so far as it established the liability of all persons who were stockholders of the company, has been sustained by the decisions of a great number of Courts, in which suits of this kind have been instituted.

The authorities cited establish the proposition, that so far as corporate rights, property, duties and obligations are concerned, a decree against the company is conclusive upon all its members, who have agreed as to such matters, "to sue and be sued *in that name.*"

As to all property which is placed under the control or in the possession of the corporation, and which by the charter can only be disposed of by the corporation, stockholders are concluded by judgments in cases to which the corporation is a party. It is submitted, that so far as the unpaid capital of a corporation is concerned, the right to call for it and to dispose of it is purely a corporate right, to be exercised by the corporation.

All the stockholders of a company assembled in general meeting cannot make a call for payment for unpaid stock, upon which an action could be maintained.

Such a call can be made only by the president and directors (at least in the case of this company). When, therefore, the Court is called upon to decide whether a call ought to be made, it is plain that a purely corporate question is presented, and that in the decision of it, it is only necessary to have before the Court *the corporation itself*, which possesses exclusive control over the subject, and that if every individual stockholder were brought before the Court, *without the corporation*, the Court would not have before it the proper party, the sole owner of the right, the exercise of which is the subject of the suit.

Consequently when the question is whether the corporation is bound to make a call, and whether the Court will make one for the corporation, upon the failure of the latter to perform its duty in that behalf, it is plain that the case involves no question over which the *stockholders individually* have any more control than strangers. If all the stockholders individually were brought before the Court, as in Dr. Salmon's case, and

the Court should order them to make an assessment, such an assessment would be nugatory, and would not be the foundation of an action against a stockholder for the amount assessed.

To make the decree effectual, it must require the assessment to be made *by the corporation* in the mode prescribed by its charter.

A decree passed in a suit instituted against the corporation, to obtain an assessment on the stock to pay debts, when the corporation is a party, affects matters entirely and exclusively of a corporate character, as if the suit was brought to recover a corporate debt, and the stockholder is as much bound by the one decree as by the other, although he may be present in Court only as represented by the company.

This was decided directly in the case in 5th Gill, in equity, cited, approved and applied by this Court in Sanger vs. Upton, 91 U. S. 58 and 59, in accordance with the law as settled in the earliest reported case in which the power of a Court of Chancery over the matter of making assessments upon members of corporations was considered and decided.

It will not be pretended that the stockholders of the company are not concluded by the decree so far as it establishes the validity and declares the legal operation and effect of the deed of September 20th, 1866, although they were not parties to the suit except by representation by the company. It is therefore established conclusively against the stockholders that the deed passed to the trustees the right to receive the uncalled capital, when called. The deed is thus established to be as effectual in passing to the trustees the right to the uncalled capital of the company, as an assignment in bankruptcy to the assignee; and all the consequences deduced by this Court in Sanger vs. Upton, 91 U. S. 58 and 59, from the assignment in bankruptcy, follow from the deed of trust in this case. Indeed this Court, in the case of Hatch vs. Dana, 101 U. S. 215, has said, in speaking of the difference between suits like that, directly against the stockholder, and suits in which the right to collect the unpaid capital has passed to an assignee in bankruptcy: "In bankruptcy an assessment or a call may be made, for the assignee of a bankrupt corpora-

tion, succeeds to its rights, and becomes the legal owner." We submit that the deed of trust in this case as conclusively construed by the Chancery Court, makes the trustees the "legal owners" with all the consequences implied in that relation, as laid down by the Court in Sanger vs. Upton. If we are right in this proposition, another follows as a matter of course, and that is, that if the question whether a call shall be made, and the question as to the amount of the call, be purely corporate questions for the decision of which, it is only necessary to have the creditor and the corporation before the Court, the stockholder is concluded as to both those questions by a decree in a case in which the corporation is a party, as effectually as he is concluded by a decree establishing any other corporate duty or obligation. If a corporation fails to pay an equitable obligation, a decree that it pay is binding upon all the stockholders, although that decree be passed in a case in which the stockholders are not parties as individuals, but only through representation by the company.

In like manner if a corporation fails to assess its stock to pay its debts, and the making of such an assessment be a corporate power and corporate duty, a decree of a Court of Equity, giving appropriate relief to the party injured by the breach of this corporate duty, is equally conclusive upon the stockholder, although not personally a party to the suit, and he cannot escape the legal consequences of such a decree, except for reasons that would enable him to escape the consequences of a decree that the corporation perform any other corporate duty or obligation.

Unless the stockholder has and asserts under proper circumstances, a defense against a claim made against his company, he will be concluded by a judgment against the corporation.

There are other considerations in this case to be taken into account in determining the force and effect of the Richmond decree.

The argument on behalf of the stockholders, particularly that part of it which deals with the defence of limitations, wholly fails to take account of the effect of the deed of trust. It is assumed, particularly in the brief of counsel from St.

Louis, that all the remedies of creditors of corporations remained open to the creditors of this corporation, and that they had other remedies besides such as they could obtain by enforcing the trusts of the deed.

Such cases as those of Ogilvie vs. Knox, &c., in 22d Howard, and Hatch vs. Dana, in 101 U. S.; and like cases of proceedings directly against stockholders by creditors to obtain a decree in personam, are cited with an entire disregard of the effect of the deed of trust, as established by the decree of the Richmond Court.

The Richmond decree conclusively establishes that the legal title to the unpaid capital stock, not only the part thereof due on calls made before the date of the deed, *but to so much as had not been called*, passed to the trustees, as effectually as that capital would have vested in an assignee in bankruptcy.

It is therefore manifest that the deed of trust afforded a complete protection to the stockholder against such suits by creditors, as those of Ogilvie vs. The Knox Co. Ins. Co., 22d Howard, and Hatch vs. Dana, 101 U. S.

If a stockholder had been sued as in those cases, he could have pleaded the deed of trust, and showed that the money in his hands belonged to the trustees and was to be applied by them according to the preferences created by the deed.

In short the deed of trust prescribed the law of the settlement of the affairs of this company, and limited its creditors to such relief as could be afforded by enforcing the powers and rights of the trustees.

Any argument therefore founded upon the assumption that after the execution of the deed of trust, the creditors had any rights or remedies save by enforcing the provisions of that deed, is altogether aside from the present case.

All creditors are bound by this law of the domicile of the corporation, and are presumed to have contracted with reference to it. Canada Southern R. R. Co. vs. Gebhard's Admr. 109 U. S. page 527.

One consequence resulting from the effect given to the deed of trust by the decree is, that no stockholder could be required to pay except by an equal assessment upon all.

The trustees could not make one or more stockholders pay in full, and leave them to seek for contribution, as was done in the two cases above mentioned. It is settled by the decree, and is established by authority, that while the trustees acquired by the deed the title to all the property of the company, including its unpaid and uncalled capital stock, they did not acquire the power to make calls, if calls were necessary to give them the right to sue for the uncalled stock.

Consequently the trustees depended for their ability to collect the uncalled capital, *upon the company* to make the necessary calls, without which, as we shall show, no action could be maintained against a stockholder.

The declaration does not set forth correctly the true legal effect of the contract between the company and the stockholder.

The nature and effect of that contract is much more accurately defined by Baron Parke in delivering the decison of the Court of Exchequer in the case of The South Staffordshire Railroad Co. vs. Burnside, 5 Exch. 129, which has been followed by all subsequent decisions in England, and by the Court of Appeals of Maryland in the cases of Glenn vs. Howard, and Glenn vs. Savage, 65 Md., 62.

The question before the Court of Exchequer, was whether a discharge in bankruptcy was a bar to an action by a liquidator to recover on calls made upon the stockholders of a corporation subsequent to the discharge. It called for an accurate definition of the contractual relation between the corporation and its members, and that relation is thus defined by the Court: "Is this then a debt payable on a contingency under the 56th section? (56th section of the Bankrupt Act of 5 Geo. 4 C. and 6). The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself *and all the other shareholders* from time to time, *not exceeding a certain sum, and regulated by the wants of the company.*

At the time of the bankruptcy, it was uncertain what the sum would be which the defendant would be called on to pay,

and no certain debt was then contracted. But in order to bring a case within the 56th section, the bankrupt must have contracted a certain debt before the bankruptcy, payable after it on a contingency." This definition of the contract between the company and its members has been followed in the cases of The General Discount Company vs. Stokes, 17 C. B. (N. S.) 765, and that of ex parte Hastie, L. R., 7. Eq. 2, before Lord Romily, in which the judgment of Baron Parke, in the case in 5th Exch. 129, is recognized as establishing the law.

If this definition of the contract between a company and its members with reference to capital stock be adopted, and we submit that it is a true definition of those relations, it sweeps away at once all arguments founded on the law governing cases of debts payable on demand. It establishes as law that there is actually no debt until the company, or other competent authority, shall determine how much shall be paid, not merely in view of the amount demandable from one stockholder, but in view of the obligations of all his associates and of the wants of the company.

The difference between such an obligation as this, and a debt payable on demand, is plain enough, and is a sufficient answer to all arguments based on the notion that the debt of the stockholder became due when the deed of trust was made, or after a reasonable time had elapsed after the deed, or that it became due at any time until the debt came into existence by the call of the Court, made because the company refused or neglected to make a call. Indeed, when we look at the consequences that would follow if it be held that the making of the deed of trust fixed the liability of the stockholder, or that anything short of an ascertainment of that liability in view of all the considerations mentioned by Baron Parke, fixed that liability, it will be at once seen that the proposition is untenable. If the deed was a call, it was a call for more than three millions of dollars to pay $350,000. The commissions of the trustees would have been nearly as great as the debt of the company.

If the stockholders owed any debt for which a suit could be maintained without a call, regulated by the considerations mentioned by the Court of Exchequer, they owed the whole of the unpaid capital, and the trustees must have sued for the whole.

That the stockholders did not so understand their position under the deed of trust, is apparent from the resolutions passed in October, 1866.

The necessity for such a call to enable the trustees to sue, is established by the decree and by repeated decisions.

Robertson vs. Sibley, 10 Minn. 330, 331.
Chandler vs. Sibley, 3 Dillon, C. C. 477.

In which Mr. Justice Miller says, that a receiver of a corporation could not sue a stockholder "without a call or assessment or something standing in the place thereof and equivalent thereto, either by the company or by a proper Court, in order to make the defendant liable."

See also Scoville vs. Thayer, 105 U. S. 153.

The creditors being thus limited to the provisions of the deed of trust for relief, and the stockholders being thus enabled by the law of the domicile of the corporation to deprive the creditors of all other remedy, it would seem to follow that there arose as an essential part of the arrangement for settling the affairs of the company, an obligation on the part of the latter to perform such acts as were necessary to give effect to the deed.

It is plain that without a call by the company, the trustees would have been powerless to execute the deed of trust, so far as a resort to the uncalled capital stock was concerned, and we must therefore either regard the deed of trust as operative, *so far as the uncalled capital is concerned*, at the mere pleasure of the company, or we must regard the making of the deed as carrying with it, an obligation on the part of the company to exercise its power to make calls in aid of its provisions.

The exercise of this power by the company thus becomes a vital part of the trust created by the deed, and we submit, that the obligation to exercise this power, instead of being

abnegated by the company when it made the deed, as is contended by the plaintiff in error, was assumed by the company and made part of the arrangement it adopted for the settlement of its affairs and the payment of its debts.

As long as a necessity for the exercise of the power to make calls continued, so long would the obligation thus assumed to use that power continue, and we have shown that the law of Virginia conferred ample power upon the company to perform its obligation in this respect, even after it had ceased to exercise all other corporate franchises.

The effect of the deed was, therefore, two-fold.

As to the *property* of the company, it became vested in the trustees by the terms of the deed, for the benefit of creditors; as to the *corporate power to make the necessary calls* to enable the trustees to execute the deed, *that* remained in the company because it could not be assigned, but it so remained under an implied covenant on the part of the company to exercise it to effectuate the trusts of the deed.

Under these circumstances, we submit that the power to make calls became itself a trust, and its execution became enforceable by a Court of Equity as any other trust, and subject only to the limitations recognized by equity, to its power to enforce any other trust.

We maintain that after executing the deed of trust, the company would not have been permitted to use its power to make calls on its stockholders for any other purpose, not even for its own corporate purposes, until and unless it first exercised that power to effectuate the trusts of the deed.

Perry on Trusts, sec. 248 and note.

The stockholders assented to all the terms of the deed of trust; in fact, they made that contract in the name of the company as effectually, to all intents and purposes, as it (not being authorized to contract in that name), each individual stockholder had signed the deed in his own name.

Houldsworth vs. City of Glasgow Bank, 5 Appeal Cases, 323–4.

Ogilvie vs. Knox, 22 Howard, 387.

Kansas Pacific vs. Atchison R. R. Co., 112 U. S. 405.

Not only did they assent to the deed, and to all that the making of the deed legally implied, but they got the benefit of it by limiting the rights of the creditors to its provisions, and protecting themselves against all claims except by an equal assessment upon each stockholder. Yet it is argued that notwithstanding all this, the moment the deed was made the company lost the power to make assessments, and that the statute of limitations began to run in favor of the stockholders as against the exercise of that right.

It seems clear to us, that if any Court of Chancery could have acquired jurisdiction over the individuals who composed the President and board of directors, they could have been compelled to make a call in aid of the trusts of the deed, as long as the trusts created by the deed remained unexecuted, upon the ground that the obligation to exercise that power, was implied by the deed itself, as incident to the trust created by it.

In this connection, we call attention to another rule of law.

It is well settled in Virginia, that when a deed of trust is made by a debtor in favor of his creditors, the statute of limitations does not run against a creditor, *so far as the trust fund created by the deed is concerned.*

Smith vs. N. R. Co., 33 Grattan 617.

Bowie vs. The Poor School, 75 Va. 300.

Hambleton vs. Glenn, Va. Law J., vol. 13, No. 12, p. 242.

The decision of this Court in The County of Morgan vs. Allen, 103 U. S. 498, quoted above, shows that the uncalled capital stock of a corporation is as much a part of its assets as the cash that has been paid in upon it, and that "when debts are incurred, a contract arises that it shall not be withdrawn or applied otherwise than upon their demand, until such demands are satisfied."

Now the Virginia decree conclusively establishes that this fund has been dedicated to the trusts declared in the deed of September 20, 1866, and by the effect of that deed under the law of Virginia, limitations do not run against creditors so far as the trust fund created by the deed is concerned.

To this deed and to all the legal consequences that follow from it, the stockholders were parties contracting in the name by which they were authorized to contract.

We submit, therefore, that when the Richmond Court obtained jurisdiction over the company and the trustees, in the creditor's suit to construe and enforce the deed, it acquired jurisdiction and power to deal with the trust fund; that the stockholders in whose hands the fund was, and who had by the deed of trust, agreed to hold it subject to the trusts of that deed, are concluded by the decree as to that fund, and that the act of the Court in making a decree touching the fund was only the execution by the Court of an essential part of the trust deed itself which the company had agreed to execute, and that the power of the Court to afford relief under the deed so far as calling for the uncalled capital stock, could only be lost by such lapse of time as would prevent the Court from affording relief as to any other matter or right connected with or growing out of the deed.

Again, we submit that if jurisdiction over the corporation gave the Court jurisdiction to make a call or assessment that shall bind the stockholder, though not a party to the suit in his individual capacity, nor otherwise than by representation by the company, (and this we understand not to be denied by some of the counsel of the plaintiff in error, see brief, at the bottom of page 7), it must follow that if the obligation of the stockholders to respond to a call, or the power of the company to make a call, or both, had expired by lapse of time, or by laches, either in the institution or prosecution of the suit, as is now claimed, the only effect would be to render the decree of the Virginia Court *erroneous.*

Supposing the reasons assigned by the plaintiff in error to show that the right of the company to call upon him had been barred by limitations, and that his liability as a stockholder had been also so barred, had been presented in the Chancery Court, the Court might have refused to levy the assessment, or it might have levied it notwithstanding these reasons. It surely will not be claimed that if the matter was within the

jurisdiction of the Court, its decision on those questions, if erroneous, would be null and void.

If it be admitted, as it seems to be, that a call made within three or five years would have concluded the stockholder, it could only be error to make such a call after that time. And the decree remains unreversed. If the stockholder was before the Court by representation so as to be bound as to the corporate property in his hands, we submit that the decree concludes him as to every defence that could have been made to the suit, and as to all reasons that could have been assigned to prevent the decree.

Harshman vs. Knox County, 122 U. S. 306-7.

The Court in passing the decree will be assumed to have done so after due consideration of all the facts before it.

All the facts upon which the defence of limitations is now sought to be founded, were before the Court.

If lapse of time had taken away the power of the company to make a call that would bind the stockholders, or if lapse of time made it wrong for the Court to pass the decree, or if the explanations of the delay, appearing in the record, to which reference has already been made, were insufficient, and the Court ought to have so decided, still all these matters have been passed upon, and however erroneous the decree may be in those particulars, it is conclusive as to all of them as the case now stands.

To hold otherwise will be to reverse the decree of the Chancery Court.

That Court may have erred in holding the facts shown by the record were sufficient to explain and excuse the delay in enforcing the trusts of the deed. Among those facts were the following: that the trustees had been prevented from acting under the deed by the decree in Baltimore, declaring it void and appointing a receiver to whom they were compelled to surrender all the books and papers of the company, (a decree that remained in force until February, 1868); that the trustees were immediately enjoined from acting under the deed by a Court in New York, at the suit of the stockholders, and re-

mained so enjoined for years; that the company wholly failed to make the necessary calls in aid of the deed; that the creditors after waiting a reasonable time for the trustees to surmount the difficulties that opposed them, attempted in 1871, by a suit brought in a Court of the habitat of the corporation, to procure the co-operation of the company and its officers in carrying the deed into effect, but were wholly prevented by the refusal of those officers to co-operate, and by the withdrawal of all the books and papers of the company, without which it was impossible to do anything, from the proper place of custody, and from the reach of the Court; and by the refusal of the trustees to allow access to these books, except to the representatives of the company; and that in consequence of this misconduct on the part of the trustees, and the refusal of the officers of that company to co-operate in enforcing the trusts of the deed, all proceedings in the suit were necessarily suspended until the discovery of a copy of the list of stockholders in 1879 enabled the creditors to proceed. We say the Chancery Court may have erred in holding these facts to have been a sufficient excuse for the apparent delay and laches on the part of the trustees and creditors, and it may be its decree might have been reversed for that reasen, but we submit that this question cannot be considered here.

Indeed, an attempt has been made to review the decree of the Chancery Court for the very reasons now relied upon to show that it does not establish the liability of the plaintiff in error.

A petition was filed by Hambleton and others, on behalf of themselves and all other stockholders, in the Circuit Court of Henrico county, to which the case was removed from the Chancery Court of Richmond,asking to be allowed to be made parties defendant, and to review and reverse the decree, assigning as reasons for the application, among others, that they were not made parties to the original suit, and had no notice of it; that no defense was made by the company; that all the debts were barred by limitations, and that they desired to have the benefit of that plea; and that all claims against the petitioners as stockholders had been so barred, and that the decree was erroneous for the above and other reasons.

The Circuit Court dismissed the petition, and on appeal the Court of Appeals affirmed the order, and declared that the decree of the Chancery Court was binding on the stockholders, and that it was not erroneous for any of the reasons assigned.

Hambleton vs. Glenn, Va. Law J., Vol 13, No 12, page 242.

This decision is practically as complete an affirmance of the decree of the Chancery Court as if rendered on a direct appeal from it, with an assignment of the same errors in that decree that are assigned here, and is an authoritative declaration of the extent to which, by the law of this Virginia corporation, its members are concluded by the decree.

Although the plaintiff in error has not directly assigned as error that the Court below erred in overruling his second defence, viz., that the trustee could not sue in his own name, we beg to call the attention of the Court to the subject, because it will serve to illustrate still further the nature and effect of the Richmond decree.

It will be seen that in every case reported of suits by assignees in bankruptcy of insolvent corporations, against stockholders, to recover the capital stock, the assignee has always had an order of Court directing him to sue for the unpaid capital, or for a part of it. All of the cases, from Sawyer vs. Hoag, 17 Wall. to Scoville vs. Thayer, 105 U. S., including the cases reported in 91 U. S., concur in this. The call of the Court is the foundation of the assignee's right to sue. In Hatch vs. Dana (101 U. S.,) this Court says: that the bankruptcy Court makes assessments *because the assignee has the legal title to the fund.*

In this case the trustees under the deed of trust, have the same right that an assignee in bankruptcy would have. The decree establishes the validity and effect of the deed, and declares that it passed the legal title to this fund to the trustee.

We have endeavored to show that the effect of the deed of trust was to take away the right of the creditor to proceed against individual stockholders, as was done in Hatch vs. Dana, and to compel him to seek relief through the deed of

trust, which required the enforcement of the obligations of the stockholders under their contracts with the company.

The Court having made a call, and having made the call payable to the substituted trustee, and having authorized and directed him to collect it by suit or otherwise, as he might be advised, we maintain that he could sue for it in his own name.

1st. Taking the narrowest view of the subject, and confining ourselves to the rule of the common law, which did not allow an assignee of a chose in action to sue in his own name, we submit that this case comes within a well established exception to that rule.

The rule itself is an extremely technical one, and the reason assigned for it is not applicable to the conditions of modern society. Even the Common-Law Courts in England recognized it as a relic of a departed order of things, for they assumed the powers of a Court of Equity in order to give the assignee of a chose in action, suing in the name of his assignor, the full benefit of the assignment.

They would not permit the assignor, in whose name the suit was brought for the benefit of the assignee, to control the suit. He could not dismiss it; he could not compromise it; in short, he could do nothing that might injuriously affect the rights of the assignee, for whose use the suit was brought. He was but a name, and the assignee the real party to all intents and purposes. He was "*dominus litis*" as effectually as if he had been the original contractor.

It has always been conceded that when a chose in action has been assigned, if the debtor expressly or impliedly recognizes the right of the assignee, he comes under an implied promise to pay the assignee, upon which the latter may maintain a suit in his own name.

In the case of Tiernan vs. Jackson, in 5 Peters, beginning at page 580, the Court say at page 597, "the general principle of law is that choses in action are not at law assignable, but if assigned, and the debtor promises to pay the debt to the assignee, the latter may maintain an action for the amount against the debtor as the money received to his use." All

that is necessary is, that there shall appear to be an expressed or implied promise on the part of the debtor to pay the debt to the assignee. In this case, the decree of the Chancery Court established conclusively that the assignment made by the company on the 20th of September, 1866, passed to the assignee the right to the unpaid subscriptions in the hands of the stockholders.

Now, who were the parties to that assignment? By the charter of the company, the members or stockholders were authorized to contract and be contracted with in the name of the company. If then, the assignment of September 20, 1866, passed the unpaid subscriptions to the trustees, were not these unpaid subscriptions passed to the trustees by the consent of every member of the company? Did not every stockholder, that deed being valid, consent that the money remaining unpaid in his hands should be payable to the trustees named in the deed? And if that be so, is it not clear that every stockholder expressly agreed that if it should be necessary to call upon him to pay more of his subscription than had been paid at the time the deed was executed, it should no longer be payable to the company, but that it should be payable to the trustees? Did he not consent to the assignment and expressly promise to pay to the trustees, and upon such consent could they not maintain the action in their own names? Not only was there a consent by operation of the deed, but the stockholders expressly consented, when they passed the resolutions at their meeting in October, 1866, directing the board to make an assessment to pay the debts of the company.

The terms of the contract of subscription being that the subscriber will pay as and when called upon to pay by the board of directors of the company, such a call was absolutely necessary to create a right of action, and in fact, there was no debt at all until created by the call. The deed of trust did not create that right of action, nor did it come into existence until the Court of Equity made the call. At the time that it made the call, the stockholders, by their deed had consented that the unpaid subscription should be payable to the trustees and not to the company, and the company itself could not

have sued for it. Had it done so, any stockholder could have replied that the right to receive that money had been by his consent, and the consent of all his co-stockholders, transferred to the trustees. Consequently, when the cause of action arose by the assessment made by the Chancery Court in Richmond, it arose when the right to receive the money called for had, by the consent of those who owed the money, become vested in the trustees, under the deed of the 20th of September, 1866, and therefore, we have a case, which under the strictest rules of the common law, entitled the assignee to sue in his own name.

The principle founded upon the equitable rules established in the case of Salmon vs. The Hamburg Company, already referred to, has become a settled rule of American law with reference to corporations. This Court has asserted the power of a Court of Equity to make a call in a great number of cases. It is held that the Courts in Bankruptcy, under the Act of 1867, possess this power, not because the Bankrupt law in terms conferred it upon them, but because in settling the affairs of a corporation they possess all the power of a Court of Equity; and the power to make an assessment by a Bankrupt Court, is but the exercise by it of an ordinary branch of the jurisdiction of a Court of Equity. We have already called attention to the fact that when this Court asserted that the Court in Bankruptcy had the power to make such a call, it referred to the decision of the Court of Appeals of Maryland, in the case of Hall vs. U. S. Ins. Co., 5 Gill, 584, where a Court of Equity exercised that power. In the case of Sanger vs. Upton, in 91 U. S. Rep., page 60, this Court say, speaking of the power of a Bankrupt Court to order the payment of their subscription by stockholders of a corporation: "A Court of Equity has often made and enforced the requisite order in such cases. The Bankrupt Court possessed the same power in the case in hand. The order rests upon a solid foundation of reason and authority;" and the Court, in support of this proposition quote the cases of Ward vs. Griswold Mfg. Co., 16 Conn., 599, and Sagory vs. Dubois, 3d Sanf. Chan., 510, in which this power of a Court of Equity was exercised.

If, then, the Chancery Court of the city of Richmond had the power to make the call or assessment upon the stockholders, and if we be right in the assumption that for the purpose of controlling the corporate property, all the stockholders were present in that Court, as represented by the company, it is difficult to conceive how the decree of the Court, levying the assessment and requiring it to be paid, is binding upon the stockholders, as we have endeavored to show that it is, but that that part of the decree which provides to whom the assessment shall be paid, is not equally binding upon them. If a Court of Equity has the power to require stockholders to pay an assessment, when the company has neglected or refused to perform its duty in that respect, unless it can direct the person to whom the assessment shall be paid, it would seem that its power was nugatory.

In the case of Ogilvie vs. Knox, this Court says that one mode of enforcing the rights of creditors of corporations is by the appointment of a receiver. The language of the Court, at page 392, is as follows: "it is true, if it be necessary to a complete satisfaction of the complainants, that the corporation be treated as insolvent, the Court may appoint a receiver, with authority to collect and receive all the debts due the company, and administer all its assets. In this way, all the other stockholders or debtors may be made to contribute." Now, as this power exists, even where the company has ceased to exist, and has been disbanded, and as it exists even where the company has been dissolved by judgment of a Court of competent jurisdiction, it is difficult to see how the power can be exercised if the receiver appointed by the Court to receive the call or assessment made by its decree upon the stockholders, is obliged to sue in the name of the company. The right to sue is not derived from the assignment, because it does not exist until a further act is done. It did not exist at the time of the assignment by the company, because the company had made no call for the unpaid subscription. It came into existence only when the Court made the call, and when it came into existence, the right to receive the fruits of the call had been vested absolutely in the trustees under the deed, by the consent of

the stockholders themselves, contracting in the name of the company.

We further submit that the obligation of the stockholder to pay the uncalled capital remaining in his hands, in case of the insolvency of the company and its ceasing to do business, is not an obligation to the company for *its own purposes*, but only for the purpose of paying its debts. The company may so deal with the stockholder as to disable itself from requiring him to pay the full amount of his subscription *for the purposes of the company itself.* In the case of Scoville vs. Thayer, the Court say in 105 U. S. Rep., page 153: "The stock held by the defendant was evidenced by certificates of full paid shares. It is conceded to have been a contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other stockholders, and the fact was known to all. As between them and the *company* this was a perfectly valid agreement. It was not forbidden by the charter, or by any law or public policy as between the company and the stockholder, and was just as binding as if it had been expressly authorized by the charter. If a company *for the purpose of increasing its business* had called upon the stockholders to pay up that part of their stock which had been satisfied 'by discount' agreed to in their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid on a fair understanding, and that bound the company." But the Court proceed to say that the law governing the duties and obligations of stockholders, imposes a tacit condition upon the contract described in the words above quoted. At page 154, the Court say: "Considered therefore in the view of a Court of Equity, the contract between the company and its stockholders was this, viz: that the stockholders should pay, say, for example, $20 per share on their stock and no more, unless it became necessary to pay more to satisfy the creditors of the company, and when that necessity arose and the amount required was ascertained, then to make such additional payments on the stock as the satisfaction of the claims of creditors required." It seems to

us therefore, that the obligations of the stockholders in the case of an insolvent company, to pay upon the requisition of a Court of Equity, a sufficient amount to satisfy the claims of creditors, is an obligation entirely distinct from their obligation to the company to pay their subscriptions for the purposes of the company. It is an obligation imposed by Courts of Equity, as growing out of the contract between the stockholder and the company, which no agreement or contract between the company and stockholder, not assented to by the creditor, can possibly affect. And this obligation being one entirely within the control of a Court of Equity in those cases in which the company has failed or neglected to perform its duty, this obligation, we say, can be enforced in its entirety by a Court of Equity. It can designate the amount to be paid, and of necessity, must be able to designate the person to whom the money shall be paid, and its decree creates an assumpsit on the part of the stockholder, not to the company, but to the person designated by the decree as the person to receive the payment of the call. The decree must be as binding upon the stockholder as to the person to be paid, as it is as to the amount to be paid.

Consequently, when the Chancery Court decreed that this assessment upon the stock should be paid to John Glenn, substituted trustee, the assumpsit created by the decree was as complete on the part of the stockholder as if he had been personally present in Court.

See 2 Greenlief Ev. sec. 102.
Hawk vs. Saunders, Cowper, 290.
National Bank vs. Grand Lodge, 98 U. S. 124.
Gaines vs. Miller, 111 U. S. 395.

We therefore respectfully submit that upon the decree of the Chancery Court of the city of Richmond, John Glenn, substituted trustee, succeeding to all the rights of his predecessors, and being the person named as obligee in the obligation on the part of the stockholders created by the decree, was entitled to sue anywhere and in any Court in his own name. The power of a Court of Equity to prevent the failure of a trust by appoint-

ing a trustee, in place of trustees who neglect or refuse to act (as in this case), is unquestionable. We refer to the decision of the Court of Appeals of Maryland, in the case of Glenn vs. Williams, 60 Md. pages 119, 120, on this subject, as showing that the appointment of a new trustee in place of others removed, or refusing to act, is a branch of Chancery jurisdiction independent of statute, and that the new trustee is by force of the decree itself, substituted in all respects for the original trustee.

The principles for which we have contended above, have received the consideration of a great many Courts of very high authority, State and Federal, in the extended litigation that has attended the efforts of the trustee to enforce the trusts of the deed under the Richmond decree, and it would be difficult to find any instance of greater unanimity of opinion.

Each of the matters set forth in the assignment of errors in this case has been passed upon repeatedly, and if there be any thing in the weight of judicial authority, it would seem that they may fairly be regarded as settled.

We refer to the following decisions in cases involving all the questions presented by this record:

In the Court of Appeals of Virginia.

Glenn vs. Vanderwechen, 6 S. E. Rep., No. 9, p. 806.

Glenn vs. Lewis, Admr., 6 S. E. Rep., No. 11, p. 866.

Hambleton vs. Glenn, Va. Law Journal, vol. 13, No. 12, p. 242.

In the Supreme Court of Alabama.

Glenn vs. Semple, 80 Alabama, 159.

Lehman &c. vs. Glenn, Va. Law J., vol. 13, No. 15, p. 302.

Semple vs. Glenn, Va. Law J., vol. 13, No. 15, p. 305.

Sayre vs. Glenn, Va. Law J., vol. 13, No. 15, p. 307.

Morris vs. Glenn, Va. Law J., vol. 13, No. 11, p. 224.

In the Court of Appeals of Maryland.

Glenn vs. Williams, 60 Md., p. 94.
Glenn vs. Clabaugh, 65 Md., p. 67.
Glenn vs. Howard, 65 Md., p. 40.
Glenn vs. Savage, 65 Md., p. 40.
Glenn vs. McKim, 66 Md., p. 479.

In North Carolina.

Glenn vs. Orr, 96 N. C., 413.

In Georgia.

Glenn vs. Howard, 8 S. E. Rep., No. 10, p. 636.

In California.

Glenn vs. Saxton, 68 California, 353.

In the Federal Courts.

Glenn vs. Camden; same vs. Bennett; same vs. Bland, in the Circuit Court of the U. S. for the District of West Virginia, reported in Parkersburg State Journal of June 25th and 26th of 1886.

In one of these cases, the late Chief Justice of the United States sat with the Circuit Judge.

Glenn vs. Jackson, and same vs. Calaway, reported in Louisville Courier Journal, October 31st, 1885, before the late Judge Baxter.

The decision in the case of Glenn vs. Dorsheimer, 23 Federal Reporter 696, and 24 Federal Reporter 536, were cited by the defendants in all the above cases, but the late Chief Justice, and Judge Baxter declined to follow the decision in the Missouri case.

Glenn vs. Springs, 26 Fed. Rep. No. 7, page 494.
Glenn vs. Scott, 28 Fed. Rep. No. 15, page 804.
Glenn vs. Coyle, 22 Fed. Rep. No. 8, page 417.
Glenn vs. Soule, 22 Fed. Rep. No. 8, page 417.
Glenn vs. Foote, 36 Fed. Rep. No. 13, page 824.

We furnish the Court with the reports of the cases in West Virginia and in Kentucky in the only form in which they exist.

The record of these Courts show the judgments rendered in accordance with the opinions contained in those copies.

In the case of Glenn vs. Busey, decided by the Supreme Court of the District of Columbia, the Court held that the trustee could not sue in his own name, but decided no other point in the case.

The decision in the case of Dorsheimer, in Missouri, the only direct authority produced by the plaintiff in error, stands alone, and it is manifest from the language of Judge Brewer, in the last decision made in that case, that he was by no means free of doubt as to the correctness of the decision.

The principles established by the decisions, State and Federal, above cited, have been followed in a recent case in Illinois, as to every question presented by the assignment of errors in this case, except the first two mentioned in the brief of counsel.

Great Western Telegraph Co. vs. Gray, 122 Ill., 630.

See also Bell's Appeal, 115 Pa. State R., 89.

Citizens' & Miners' Saving Bank vs. Gillespie, 115 Pa. State, 564.

Lane's Appeal, 105 Pa. State, pages 58 and 59.

In conclusion, with reference to the allowance of interest by the jury which is assigned as error here, (improperly, as we have endeavored to show), we call attention to the provision of the statute of Virginia on the subject of the liability of shareholders for installments called for by the company.

The Code of 1860, title 18, ch. 57, section 21, provides:

"If the money any stockholder has to pay upon his shares, be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action or motion, as aforesaid."

A like provision will be found in the Code of 1873, title 18, ch. 57, sec. 25.

The decree of the Richmond Court has the same legal effect as the call of the company, and subjects the shareholder to the same legal obligation. It creates a debt that bears interest from the time it is created until it is discharged by the law of the corporation.

Of course any *penalty* imposed by the by-laws of a company upon its members for failure to pay calls promptly, when made *for the use of the company*, as in the case cited in the brief of counsel for plaintiff in error, would not attach to a call made to pay debts by a Court.

Indeed, it is doubtful, in view of the Virginia statute quoted above, whether the Virginia corporation could lawfully impose such a penalty.

In conclusion, we call the attention of the Court to what was said in the case of Flash vs. Conn, 109 U. S. 378: "We think this is a case where the construction of the State Court is entitled to great, if not conclusive, weight with us. It is the settled construction of the law of the State upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under section 10 arises upon contract, the six years' limitatiom applies to it; if the liability is in the nature of a penalty, the three years' limitation applies. It is clear that confusion and uncertainty would result, should the State and Federal Courts place different constructions on the section. Such a result ought, if possible, to be avoided."

It is true that this decision (that made in New York), was made after the defendant had become a stockholder in the Pensacola Lumber Company, but there had been no previous contrary decision. As said by this Court in Burgess vs. Seligman, 107 U. S. 20, "even in most cases, for the sake of harmony and to avoid confusion, the Federal Courts will lean towards an agreement of view with the State Courts, if the question seems to them balanced with doubt."

"If this were a case arising in the State of New York, we should therefore follow the construction put upon the statute by the Courts of that State. The circumstance that the case comes here from the State of Florida, should not have the statute open to a different construction."

CHARLES MARSHALL,
JOHN HOWARD,
Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 235.

G. W. EMBREY, PLAINTIFF IN ERROR,

vs.

E. S. JEMISON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED MARCH 18, 1886.

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1 In the Circuit Court of the United States for the Eastern District of Virginia, Richmond, Va.

E. S. JEMISON, Doing Business under the Firm Name and Style of E. S. Jemison & Co.,
vs.
G. W. EMBREY. } No. 1486.

In debt.

Be it remembered that on the 8th day of November, A. D. 1884, came the plaintiff, by his attorney, and sued out of the clerk's office of the circuit court of the United States for the eastern district of Virginia, a summons in debt against the defendant, which, with the return of the marshal thereon, is as follows:

Summons.

Circuit Court of the United States of America, Eastern District of Virginia, *ss.*

The President of the United States of America to the marshal of the eastern district of Virginia, Greeting:

We command you that you summon G. W. Embrey, if he shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office, in the
2 custom-house, in the city of Richmond, in the district aforesaid, on the first Monday of December next, to answer unto E. S. Jemison, doing business under the firm name and style of E. S. Jemison & Co., in a plea of debt, to his damage, as he alleges, of thirty thousand three hundred and seventy-six dollars and sixty-one cents and interest, and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 8th day of November, in the year of our Lord 1884, and of our Independence the 109th year.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Marshal's Return.

Executed this 8th day of November, 1884, by delivering to G. W. Embrey, the within-named defendant, in person, a true copy of this writ, together with a copy of the declaration.

THOS. E. BALLARD,
Deputy Marshal.

And on the same day, to wit, November 8th, A. D. 1884, the plaintiff, by his attorney, filed his declaration against the defendant, which, with the exhibits thereto attached, is as follows:

Declaration.

In the Circuit Court of the United States for the Eastern District of Virginia.

3 E. S. JEMISON, Doing Business under *under* the Firm Name and Style of E. S. Jemison & Co., Plaintiffs,

vs.

G. W. EMBREY.

Petition.

E. S. Jemison, who is a citizen of the State of New York, complains of G. W. Embrey, who is a citizen of the State of Virginia, residing at Richmond, Va., defendant in this action, and for a cause of action against said defendant avers and alleges that he, said plaintiff, is doing business in the city of New York under the firm name and style of E. S. Jemison & Co., in accordance with the laws of the State of New York.

That prior to the time of making the notes hereinafter mentioned said plaintiff and one W. L. Moody were and had been copartners under the firm name and style of Moody & Jemison, in the city of New York; that upon the winding up of the business of said firm the defendant, G. W. Embrey, being indebted to and owing said firm of Moody & Jemison a large amount of money, made, executed, and delivered to said firm his certain promissory note, bearing date the 21st day of January, A. D. 1878, and thereby promised to pay to the order of Moody & Jemison, six months after the date thereof, seven thousand five hundred and ninety-four dollars and fifteen cents, at the office of E. S. Jemison & Co., in the city of New York.

4 (A copy of said note is hereto attached, marked Exhibit "A," and made part of this petition, to which reference is made for a more complete description thereof.)

That said defendant, although often requested, has not yet, nor has any person or persons for him, paid said sum of money or any part thereof or any interest thereon, but does still wholly neglect and refuse so to do; wherefore the plaintiff demands judgment against said defendant for the said sum of money, and for other relief, for which see the general prayer of this petition.

Second. And for a second and further cause of action against said defendant this plaintiff avers and alleges that heretofore, to wit, on the 21st day of January, A. D. 1878, said defendant, G. W. Embrey, made his certain promissory note in writing, whereby he promise-to pay, six months after the date thereof, to the order of Moody & Jemison, seven thousand five hundred and ninety-four dollars and fifteen cents, at the office of E. S. Jemison, in the city of New York. (A copy of said note is hereto attached, marked "Exhibit B," and made a part of this petition, to which reference is made for a more complete description thereof.)

That said defendant, although often requested, has not yet, nor has any person or persons for him, paid said sum of money or any

part thereof or any interest thereon, but does wholly neglect and refuse so to do; wherefore plaintiff demands judgment against
5 said defendant for the said sum of money and for other relief, for which see the general prayer of this petition.

Third. And for a third and further cause of action against said defendant this plaintiff avers and alleges that heretofore, to wit, on the 21st day of January, A. D. 1878, said defendant, G. W. Embrey, made his certain promissory note in writing, whereby he promised to pay, twelve months after the date thereof, to the order of Moody & Jemison, seven thousand five hundred and ninety-four dollars and fifteen cents, at the office of E. S. Jemison & Co., New York, for value received. (A copy of said note is hereto attached, marked "Exhibit C," and made part of this petition, to which reference is made for a more accurate description thereof.) That said defendant, although often requested, has not yet, nor has any person or person for him, paid said sum of money or any part thereof or any interest thereon, but to pay the same wholly neglects and refuses so to do; wherefore plaintiff demands judgment against said defendant for the amount of said promissory note and for other relief, for which see the general prayer of this petition.

Fourth. And for a fourth and further cause of action against said defendant this plaintiff avers and alleges that heretofore, to wit, on the 21st day of January, A. D. 1878, said defendant, G. W. Embrey, made his certain promissory note in writing, whereby he
6 promised to pay to the order of Moody & Jemison, twelve months after the date thereof, seven thousand five hundred and ninety-four dollars and sixteen cents, at the office of E. S. Jemison & Co., New York, for value received. (A copy of said note is hereto attached, marked "Exhibit D," and made part of this petition, to which reference is made for a more complete description thereof.)

That said defendant, although often requested, has not yet, nor has any person or persons for him, paid said sum of money or any part thereof or any interest thereon, but to pay the same wholly neglects and refuses so to do.

Wherefore plaintiff demands judgment against said defendant for the amount of said promissory note and for other relief, for which see the general prayer of this petition.

And this plaintiff further avers and alleges that at or about the time said promissory notes above mentioned were executed the said firm of Moody & Jemison were winding up their business, intending to dissolve said firm. The said copartnership of Moody & Jemison was dissolved by the withdrawal of W. L. Moody from said firm, and that said plaintiff continued the business of said partnership under the firm name and style of E. S. Jemison & Co.; that all of the uncollected notes, accounts, &c., and the business of said
7 old firm of Moody & Jemison were transferred to the firm of E. S. Jemison & Co., and all of said promissory notes above mentioned and described were transferred by indorsement and came lawfully into the possession of said E. S. Jemison & Co. as the successor to Moody and Jemison.

Wherefore plaintiff demands judgment against said defendant, G. W. Embrey, for the sum of thirty thousand three hundred and seventy-six dollars and sixty-one cents ($30,376.61), principal, with interest on $15,188.30 thereof, at the rate of six per cent. per annum, from the 25th day of July, A. D. 1878, and with interest on $15,188.31 thereof, at the rate of six per cent. per annum, from the 25th day of January, A. D. 1879, together with all costs, disbursements, and expenses of this action.

JAMES LYONS,
Plaintiff's Attorney.

"EXHIBIT A." Filed with Declaration.

$7,594.15. NEW YORK, *Jan'y 21st*, 1878.

Six months after date I promise to pay to the order of Moody & Jemison seventy-five hundred & ninety-four .15 dollars, at office of E. S. Jemison & Co., N. Y., value received

No. —. Due —.

G. W. EMBREY.

EXHIBIT B. With Declaration.

$7,594.15. NEW YORK, *Jan'y 21st*, 1878.

8 Six months after date I promise to pay to the order of Moody & Jemison seventy-five hundred & ninety-four $\frac{15}{100}$ dollars, at office of E. S. Jemison & Co., N. Y., value re-ceived.

No. —. Due —.

G. W. EMBREY.

"EXHIBIT C." With Declaration.

$7,594.15. NEW YORK, *Jan'y 21st*, 1878.

Twelve months after date I promise to pay to the order of Moody & Jemison seventy-five hundred & ninety-four .15 dollars, at office of E. S. Jemison & Co., N. Y., value received.

No. —. Due —.

G. W. EMBREY.

"EXHIBIT D." With declaration.

$7,594.16. NEW YORK, *Jan'y 21st*, 1878.

Twelve months after — I promise to pay to the order of Moody & Jemison seventy-five hundred & ninety-four $\frac{15}{100}$ dollars, at office of E. S. Jemison & Co., value received.

No. —. Due —.

G. W. EMBREY.

The foregoing notes are, respectively, endorsed "Moody & Jemison."

Common Order.

And at another day, to wit, at rules held in the clerk's office of the circuit court of the United States for the eastern district of Virginia on the first Monday of December, A. D. 1884.

9 The defendant not appearing, on motion of the plaintiff, by his attorney, it is ordered that judgment be entered in his behalf against said defendant for the debt and interest claimed in the declaration, unless said defendant shall appear and plead to issue at the next rules.

And on another day, to wit, at rules held in the clerk's office of said United States circuit court on the first Monday of January, A. D. 1885.

This day came the defendant, by his attorney, and filed his demurrer to the plaintiff's declaration, and also two pleas in writing, which are as follows:

General Demurrer.

G. W. EMBREY, Def't, *ads.* E. S. JEMISON, Who Sues, &c., Pl't'ff.

In debt.

And the said defendant comes and says that the plaintiff's declaration is not sufficient in law.

JAMES M. MATTHEWS, *P. D.*

Plea of Nil Debet.

And the said defendant, by his attorney, comes and says that he does not owe the said sum of thirty thousand three hundred and seventy-six dollars and sixty-one cents or any part thereof, in

10 manner and form as the said plaintiff hath above complained, and of this the said defendant puts himself upon the country.

JAMES M. MATTHEWS, *P. D.*

Plea of Act of Limitations.

And the said defendant, by his attorney, comes and says that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the said plaintiff at any time within five years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against him, and this he is ready to verify.

JAMES M. MATTHEWS, *P. D.*

And at another day, to wit, at rules held in the clerk's office of the said circuit court of the United States of America on the first Monday of February, A. D. 1885.

Now comes the plaintiff and moves for judgment for the full amount in his declaration claimed, because neither the defendant nor any one in his behalf hath made oath or affirmation that his

pleas are true, nor is there any certificate of counsel, as required by rule 11, nor does the defendant's demurrer set forth the
11 causes of the demurrer on its face, as required by rule 18.

JAMES LYONS,
For Plaintiff.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 6th day of February, 1885, the following orders were entered, viz:

E. S. JEMISON, &c., *v.* G. W. EMBREY.

In debt.

The clerk must make entries in the above-named cause in strict accordance with rule 11 & rule 18 of the rules of this court.

RO. W. HUGHES, *Judge.*

The clerk will enter common order confirmed *nunc pro tunc* as of January rules, 1885, and judgment by default, as in an uncontested case, as of January adjourned term, 1885, *nunc pro tunc.*

RO. W. HUGHES, *Judge.*

And at another day, to wit, at rules held in the clerk's office of the said United States circuit court on the first Monday of January, 1885.

The defendant still failing to appear, on motion of the
12 plaintiff, by his attorney, it is ordered that the order made against said defendant in this cause at December rules, 1884, be confirmed. Therefore it is considered that the plaintiff recover against the defendant the sum of thirty thousand three hundred and seventy-six dollars and sixty-one cents, with interest at the rate of six per centum per annum on $15,188.30, part thereof, from the 25th day of July, A. D. 1878, and with like interest on $15,188.31, residue thereof, from the 25th day of January, A. D. 1879, until paid, together with all costs, disbursements, and expenses of this action.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 17th day of February, A. D. 1885.

E. S. JEMISON & Co., Plaintiff, *v.* G. W. EMBREY, Defendant.

In debt.

Came the parties aforesaid, by their attorneys, and, on the motion of the defendant to set aside the order entered in this cause on the 6th of February, 1885, confirming the office judgment obtained at rules and giving judgment by default, as in an uncontested case, and the arguments of counsel being heard on the said motion, the court, for reasons within its discretion, doth sustain the said
13 motion; and, on the further motion of the defendant, he is allowed to file a special demurrer to the plaintiff's declaration,

and also the plea of *nil debet*, the plea of the act of limitations, and a special plea in writing, which are accordingly filed; and thereupon the judgment obtained at rules in this cause is likewise set aside, and thereupon this cause is continued; to which ruling and action of the court the plaintiff excepts, and prays that a writ of error and supersedeas to the Supreme Court of the United States may be allowed him; which is accordingly done.

Special Demurrer Filed by Defendant to Plaintiff's Declaration in Pursuance of the Foregoing Order.

The defendant says that the plaintiff's declaration is not sufficient in law, and for ground of demurrer says that the several notes of the defendant, on which he has declared, were executed by the defendant, and made payable to the order of "Moody and Jemison," of which firm the plaintiff was at the time a member, and that no right of action accrued to the plaintiff on the said notes by reason of anything stated in the said declaration or otherwise.

JAMES M. MATTHEWS, *P. D.*

14 *Plea of Act of Limitations.*

G. W. EMBREY *ads.* E. S. JEMISON, &c.

In debt.

And the said defendant, by his attorney, comes and says that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the said plaintiff at any time within five years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against him, and this he is ready to verify.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF
UNITED STATES, EASTERN DISTRICT OF VIRGINIA,
RICHMOND, *February 17th*, 1885.

G. W. Embrey this day personally appeared before me, the clerk of said court, in my said office, and made oath that the above plea is true, and that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

15 I do hereby certify, as counsel for the said G. W. Embrey in the above action, that I advised him to file the above plea.

JAMES M. MATTHEWS, *P. D.*

Plea of Nil Debet.

G. W. EMBREY, Def't, *ads.* E. S. JEMISON, &c., Pl't'ff.

In debt.

And the said defendant, by his attorney, comes and says that he does not owe the said sum of thirty thousand three hundred and seventy-six dollars and sixty-one cents or any part thereof, in manner and form as the said plaintiff hath above complained, and of this the said defendant puts himself upon the country.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF
UNITED STATES, EASTERN DISTRICT OF VIRGINIA,
RICHMOND, *February 17th*, 1885.

G. W. Embrey this day personally appeared before me, the clerk of said court, in my said office, and made oath that the above plea is true, and that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by his counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

I do hereby certify, as counsel for the said G. W. Embrey
16 in the above action, that I advised him to file the above plea.

JAMES M. MATTHEWS, *P. D.*

Special Plea of Wager.

G. W. EMBREY, Def't, *ads.* E. S. JEMISON, &c., Pl't'ff.

In debt.

And the said defendant, by his attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action against the defendant, because he says that the several notes on which the said action is founded, and which are particularly set forth in the plaintiff's declaration, were executed by the defendant to the late firm of Moody and Jemison (of which plaintiff was at the time a member) in consideration of money lost by the defendant to the said late firm of Moody and Jemison at wager by the defendant with said late firm, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF.
UNITED STATES, EASTERN DISTRICT OF VIRGINIA.
RICHMOND, *February 17th*, 1885.

G. W. Embrey this day personally appeared before me, the

17 clerk of said court, in my said office, and made oath that the above plea is true, and that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

I do hereby certify, as counsel for the said G. W. Embrey in the above action, that I advised him to file the above plea.

JAMES M. MATTHEWS.

And on another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 7th day of April, 1885:

E. S. JEMISON & Co. *vs.* G. W. EMBREY.

In debt.

Came the parties aforesaid, by counsel, and on the motion of the plaintiff leave is given him to file an amended declaration in this cause on condition of his paying to the defendant his costs occasioned by such amendment, and leave is given to the defendant to demur or plead *de novo* to said declaration within thirty days.

RO. W. HUGHES, *Judge.*

And thereupon the said plaintiff filed his amended declaration, which is as follows:

18 *Amended Declaration.*

In the Circuit Court of the United States for the E. D. of Va., at Richmond, to wit, April Term, 1885.

E. S. Jemison, a citizen of the State of New York, residing and doing business in the city of New York as E. S. Jemison & Co., plaintiff, complains of G. W. Embrey, a citizen of the State of Virginia, residing at Richmond, Virginia, defendant, summoned, &c., of a plea that the defendant render unto the plaintiff the sum of thirty thousand three hundred and seventy-six $\frac{61}{100}$ dollars, with interest, at the rate of six per cent. per annum, on $15,188.30, part thereof, from the 25th day of July, in the year 1878, and on $15,188.31, residue thereof, from the 25th day of January, 1879, until paid, which the said defendant owes to and unjustly detains from the said plaintiff, for this, to wit, that the said G. W. Embrey heretofore, to wit, on the 21st day of January, in the year 1878, at New York, to wit, at the said city of Richmond, made his certain note in writing, bearing date the day and year last aforesaid, by which said note he, the said G. W. Embrey, promised to pay, six months after the date thereof, to the order of Moody & Jemison, citizens of the State of New York, the sum of seventy-five hundred and ninety-four $\frac{15}{100}$ dollars ($7,594.15), at the office of E. S. Jemison & Co., N. Y., value received; and the

said Moody & Jemison, after the making of the said note and
19 before the same became payable, to wit, on the day and year last aforesaid, at the city aforesaid, by writing their name on the back thereof, did endorse the said note and assign and deliver the same to the plaintiff, thereby ordering and appointing the payment of the sum of money in the said note mentioned to be made to the plaintiff; of all which the said defendant afterwards, to wit, on the same day and year, had notice; and the plaintiff avers that afterward, when the said note became due and payable according to the tenor and effect thereof, to wit, on the 24th day of July, in the year 1878, at the said office of E. S. Jemison & Co., at New York, the said note was duly presented and payment of the sum of money therein specified was duly required; but neither the said defendant nor any person or persons whosoever did, when the said note was so presented for payment or at any time before or afterward, pay the said sum of money therein specified or any part thereof, but wholly neglected and failed so to do; of all which premises the said defendant afterward, to wit, on the day and year and at the place last aforesaid, had due notice. By reason of all which, and by force of the act of Assembly in such case made and provided, the said defendant became liable to pay the said plaintiff and action accrued to the said plaintiff to demand and have of and from the said defendant
20 the sum of seventy-five hundred and ninety-four $\frac{15}{100}$ dollars, parcel of the said sum of thirty thousand three hundred and seventy-six $\frac{61}{100}$ dollars first above demanded.

And for this also, to wit, that the said G. W. Embrey heretofore, to wit, on the 21st day of January, in the year 1878, at New York, to wit, at the said city of Richmond, made his certain other note in writing, bearing date the day and year last aforesaid, by which said note he, the said G. W. Embrey, promised to pay, six months after the date thereof, to the order of Moody and Jemison, citizens of the said State of New York, the further sum of seventy-five hundred and ninety-four $\frac{15}{100}$ dollars ($7,594.15), at the office of E. S. Jemison & Co., N. Y., value received; and the said Moody & Jemison, after the making of the said note and before the same became payable, to wit, on the day and year last aforesaid, at the city aforesaid, by writing their name on the back thereof, did endorse the said note and assign and deliver the same to the plaintiff, thereby ordering and appointing the payment of the sum of money in the said note mentioned to be made to the plaintiff; of all which the said defendant afterwards, to wit, on the same day and year, had notice; and the plaintiff avers that afterwards, when the said note became due and payable according to the tenor and effect thereof, to wit, on the 24th day of July, in the year 1878, at the said office of E. S. Jemison & Co., at
21 New York, the said note was duly presented and payment of the sum of money therein specified was duly required, but neither the said defendant nor any person or persons whosoever did, when the said note was so presented for payment or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected and failed so to do; of all which premises the said defendant afterwards, to wit, on the day

and year and at the place last aforesaid, had due notice. By reason of all which, and by force of the act of Assembly in such case made and provided, the said defendant became liable to pay to the said plaintiff and action accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of seventy-five hundred and ninety-four $\frac{15}{100}$ dollars, other parcel of the said sum of thirty thousand three hundreed and seventy-six $\frac{61}{100}$ dollars first above demanded.

And for this also, to wit, that the said G. W. Embrey heretofore, to wit, on the 21st day of January, in the year 1878, at New York, to wit, at the said city of Richmond, made his certain other note in writing, bearing date the day and year last aforesaid, by which said note he, the said G. W. Embrey, promised to pay, twelve
22 months after the date thereof, to the order of Moody & Jemison, citizens of the said State of New York, the further sum of seventy-five hundred and ninety-four $\frac{16}{100}$ dollars ($7,594.16), at office of E. S. Jemison & Co., N. Y., value received; and the said Moody & Jemison, after the making of the said note and before the same became payable, to wit, on the day and year last aforesaid, at the city aforesaid, by writing their name on the back thereof, did endorse the said note and assign and deliver the same to the plaintiff, thereby ordering and appointing the payment of the sum of money in the said note mentioned to be made to the plaintiff; of all which the said defendant afterwards, to wit, on the same day and year, had notice; and the plaintiff avers that afterwards, when the said note became due and payable according to the tenor and effect thereof, to wit, on the 24th day of January, in the year 1879, at the said office of E. S. Jemison & Co., at New York, the said note was duly presented and payment of the sum of money therein specified was duly required, but neither the said defendant nor any person or persons whosoever did, when the said note was so presented for payment or at any time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected and failed so to do; of all which premises the said defendant
23 afterwards, to wit, on the day and year and at the place last aforesaid, had due notice. By reason of all which, and by force of the act of Assembly in such case made and provided, the said defendant became liable to pay to the said plaintiff and action accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of seventy-five hundred and ninety-four $\frac{16}{100}$ dollars, other parcel of the said sum of thirty thousand three hundred and seventy-six $\frac{61}{100}$ dollars first above demanded.

And for this also, to wit, that the said G. W. Embrey heretofore, to wit, on the 21st day of January, in the year 1878, at New York, to wit, at the said city of Richmond, made his certain other note in writing, bearing date the day and year last aforesaid, by which said note he, the said G. W. Embrey, promised to pay, twelve months after the date thereof, to the order of Moody & Jemison, citizens of the State of New York, the further sum of seventy-five hundred and ninety-four $\frac{15}{100}$ dollars ($7,594.15), at office of E. S. Jemison & Co.,

N. Y., value received; and the said Moody & Jemison, after the making of the said note and before the same became payable, to wit, on the day and year last aforesaid, at the city aforesaid, by writing their name on the back thereof, did endorse the said
24 note and assign and deliver the same to the plaintiff, thereby ordering and appointing the payment of the sum of money in the said note mentioned to be made to the plaintiff; of all which the said defendant afterwards, to wit, on the same day and year, had notice; and the plaintiff avers that afterwards, when the said note became due and payable according to the tenor and effect thereof, to wit, on the 24th day of January, in the year 1879, at the said office of E. S. Jemison & Co., at New York, the said note was duly presented and payment of the sum of money therein specified was duly required, but neither the said defendant nor any person or persons whosoever did, when the said note was so presented for payment or at any time before or afterward, pay the said sum of money therein specified or any part thereof, but wholly neglected and failed so to do; of all which premises the said defendant afterwards, to wit, on the day and year and at the place last aforesaid, had due notice. By reason of all which, and by force of the act of Assembly in such case made and provided, the said defendant became liable to pay to the said plaintiff and action accrued to the said plaintiff to demand and have of and from the said defendant the said last-mentioned sum of $7,594.15, residue of the said sum of $30,376.61 first above demanded.

25 Nevertheless, the said defendant, although often requested so to do, has not as yet paid to the said plaintiff the said sum of $30,376.61 and interest above demanded or any part thereof, but to pay the same he hath hitherto wholly neglected and refused and he doth still refuse, to the damage of said plaintiff $30,376.61, and therefore he sues, &c.

JAMES LYONS, *P. Q.*

And on another day, to wit, on the 14th day of April, A. D. 1885, came the defendant, by his attorney, and filed in the clerk's office in said circuit court his demurrer and pleas to the plaintiff's amended declaration, as follows:

Demurrer to Amended Declaration.

G. W. EMBREY, Def't, *ads.* E. S. JEMISON & Co., Pl't'ff.

In debt.

The defendant, by his attorney, comes and says that the plaintiff's amended declaration is not sufficient in law, and for ground of demurrer says that the said declaration does not state or aver that Moody and Jemison, the payees and alleged indorsers of the several notes on which the plaintiff has declared and through whom the plaintiff, as indorsee of the said several notes asserts his right to institute this suit on the said notes, are citizens of some other
26 State than the State of Virginia, and name the particular State of which they are citizens, and that no right of action

accrued to the plaintiff by reason of anything stated in the said declaration or otherwise.

JAMES M. MATTHEWS, *P. D.*

Plea of Limitations to Amended Declaration.

And the said defendant, by his attorney, comes and says that the said several supposed causes of action in the amended declaration mentioned did not, nor did any or either of them, accrue to the said plaintiff at any time within five years next before the commencement of this suit, in manner and form as the said plaintiff hath above complained against him, and this he is ready to verify.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF VA., *April* 14, 1885.

G. W. Embrey this day appeared before me, clerk of said court, in my said office, and made oath that the above plea is true, and that he believes that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

27 I do hereby certify, as counsel for the said G. W. Embrey in the above action, that I advised him to file the above plea.

JAMES M. MATHEWS, *P. D.*

Special Plea of Wager to the Amended Declaration.

And the said defendant, by his attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiff ought not to have or maintain his aforesaid action against him because he says that the several notes on which the said action is founded, and which are particularly set forth in the plaintiff's amended declaration, were executed by the defendant to the late firm of Moody & Jemison (of which the plaintiff was at the time a member) in consideration of money lost by the defendant to the said late firm of Moody & Jemison at wager by the defendant with the said late firm, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him, &c.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF
UNITED STATES, EASTERN DISTRICT OF VIRGINIA, AT
RICHMOND, *April* 14*th*, 1885.

G. W. Embrey this day appeared before me, the clerk of said court, in my said office, and made oath that he believes the above
28 plea is true, and that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

I do hereby certify, as counsel for the said G. W. Embrey in the above action, that I advised him to file the above plea.

JAMES M. MATTHEWS, *P. D.*

Plea of Nil Debet to Amended Declaration.

And the said defendant, by his attorney, comes and says that he does not owe the said sum of thirty thousand three hundred and seventy-six dollars and sixty-one cents or any part thereof, in manner and form as the said plaintiff hath in his amended declaration above complained, and of this the said defendant puts himself upon the country.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF UNITED STATES, EASTERN DISTRICT OF VIRGINIA, RICHMOND, *April 14th*, 1885.

G. W. Embrey, this day appeared before me, clerk of said court, in my said office, and made oath that the above plea he believes to be true, and that he verily believes he will be able at the trial of the cause to produce sufficient evidence to support the said
29 plea, and that he is advised by counsel to file the said plea.

Given under my hand the day and year aforesaid.

M. F. PLEASANTS, *Clerk.*

I do hereby certify, as counsel for the said G. W. Embrey in the above action, that I advised him to file the above plea.

JAMES M. MATTHEWS, *P. D.*

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 15th day of April, 1885.

E. S. JEMISON & Co., Plaintiff,
vs.
G. W. EMBREY, Defendant. } 1486.

In debt.

Came the parties aforesaid, by their attorneys, and, on the motion of the defendant, leave is given him to withdraw his demurrer to the plaintiff's amended declaration filed in this cause, and the plaintiff files a special replication in writing to the defendant's plea of the statute of limitations to the said declaration, to which leave is given to the defendant to file a special rejoinder in writing, and the plaintiff files a special demurrer to the defendant's plea of wager to said declaration, and the defendant joins in said demurrer; and, the matters of law arising upon the said demurrer being argued,
30 the court doth sustain the said demurrer, with leave given to the defendant to amend his said plea of wager within thirty

days, and the plaintiff replies generally to the defendant's plea of *nil debet* to said declaration, and issue is joined between the parties as to the said plea of *nil debet.*

Plaintiff's Special Replication to the Defendant's Plea of the Statute of Limitations, Filed as Above.

And the said plaintiff says that he ought not to be barred by reason of anything by the said defendant in his said plea of the statute of limitations alleged, because he says that at the time when the said several causes of action in the declaration mentioned and each and every of them did accrue to the said plaintiff the said defendant had before resided in the State of Virginia, and did by departing without the same obstruct the said plaintiff in the prosecution of his said several causes of action and of each and every of them for several, to wit, two or more, years next after the same accrued as aforesaid; and the said plaintiff says that the time that such obstruction continued is not to be computed as any part of the time within which the said several causes of action and each and every of them ought to have been prosecuted, and that, excluding the said time that such obstruction continued, the plaintiff
31 brought this said action within five years next after the accruing of the said several causes of action and of each and every of them; and this he is ready to verify. Wherefore he prays judgment and his debt aforesaid, together with his damages by him sustained by reason of the detention thereof, to be adjudged to him, and his costs.

Plaintiff's Demurrer to Defendant's Special Plea of Wager, Filed as Above.

And the said plaintiff, as to the special plea of wager above pleaded by the said defendant, demurs thereto and says that the same is not sufficient in law, and for cause of demurrer shews that the said plea is not specific, but is vague and general in its terms, and does not state any facts or circumstances in manner and form sufficient in law, &c. Wherefore he prays judgment and his debt aforesaid, &c.

And on another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 9th day of May, 1885.

On the motion of the defendant, by counsel, the further time of twenty days in addition to the time heretofore allowed is given the defendant in which to amend his plea of wager filed in this
32 cause.

RO. W. HUGHES, *Judge.*

And on another day, to wit, on the 16th day of May, 1885, came the defendant, by his attorney, and filed his rejoinder to the special replication of the plaintiff to the defendant's plea of the statute of limitations, which, with the endorsement thereon, is as follows:

G. W. EMBREY, Def't, *ads.* E. S. JEMISON, Pl't.

In debt.

The defendant says that the plaintiff ought not by reason of anything in his replication alleged to have and maintain his action against him, because he says that by his removal from the State of Virginia and departing without the same, as in his said replication is alleged, he did not obstruct the said plaintiff in the prosecution of his suit upon the alleged causes of action in the declaration mentioned, because he says that his removal from the State of Virginia and departing without the same was in the year 1859, a long time before any of the alleged causes of action existed or accrued to the plaintiff against this defendant, and that when said causes of action accrued to the plaintiff he was and still considers himself
33 a citizen of the State of Louisiana; and this he is ready to verify, &c.

JAMES M. MATTHEWS, *P. D.*

Endorsement on above rejoinder.

I move to reject this rejoinder on the authority of Ficklen's Ex'r *vs.* Carrington, 31 Grattan, p. 219; Code 1873, ch. 146, sec. 20, p. 1002. and also because of a departure from the previous pleadings of the defendant.

JAMES LYONS, *P. Q.*

And on the same day, to wit, at a circuit court as aforesaid, held as aforesaid on May 9th, 1885, the following order was entered in this cause:

The court, for reasons stated in writing, as a part of this order, doth sustain the motion of the plaintiff to reject the special rejoinder of the defendant to the special replication of the plaintiff to the defendant's plea of the statute of limitations, and doth reject the said special rejoinder.

RO. W. HUGHES, *Judge.*

Opinion of the Court Made Part of the Above Order.

I think the teaching of the case of Ficklin *vs.* Carrington is that mere absence from the State, under the circumstances contemplated by the statute, is to be regarded as obstructing a suit.

This being so, what is the provision of sec. 20 of ch. 146 of the Code of Va.? The provision is peculiar, and I am inclined
34 to think not such as the Legislature really intended. It excepts from the general act of limitation the case in which the cause of action accrues against a person who had before resided in the State—that is to say, a case where the cause of action arises after the departure from the State. It especially provides for a case in which there is first a departure and then a contract. It contemplates the case of a non-resident who enters into a contract after removing from the State.

Strangely enough, the defendant in his rejoinder pleads the very condition of things in defense which the law declares shall not be a defense under the general statute of limitations.

RO. W. HUGHES, *Judge.*

And on another day, to wit, on the 2nd day of June, 1885, came the defendant, by his attorney, and filed in the clerk's office of the said circuit court his amended plea of wager as follows:

Plea of Wager.

G. W. EMBREY, Def't, *v.* E. S. JEMISON & Co., Pl't'ff.

In debt.

And the said defendant, by his attorney, comes and says that the plaintiff ought not to have and maintain his action against him,
35 because he says that on the last of February or the first of March, in the year 1877, he contracted with the plaintiff, E. S. Jemison, one of the firm of Moody & Jemison (brokers and commission merchants of the city of New York), members of the New York Cotton Exchange, through the said Jemison, the plaintiff, to purchase for the defendant on a margin, in the said cotton exchange, not actual cotton, but four thousand bales of future-delivery cotton for May delivery, commonly called "futures," which the said Jemison, the plaintiff, as one of the said firm, purchased; that at the time of the said purchase the defendant had in the hands of said Moody and Jemison about eight thousand dollars, which stood as and was a margin to protect the said purchase against the fluctuations of the market; that in the first few days of the month of March the said E. S. Jemison, of the said firm of Moody & Jemison, reported to the defendant that the margin was about exhausted by decline in the market, and called on the defendant for more margin, which the defendant informed the said Jemison he was unable to put up; that no agreement or contract was at the time or afterwards made by this defendant with the said firm of Moody & Jemison to have the said cotton futures carried for his account; that no report was ever afterwards made to this defendant of any
36 sale of the said cotton futures; that on the 21st day of January, 1878, in the said city of New York, the said Jemison, the plaintiff, of the said firm of Moody & Jemison, called on the defendant for his four notes for losses which he alleged that the said Moody and Jemison had sustained by carrying the said cotton futures, which notes the defendant executed, and which are the identical four notes in the plaintiff's declaration mentioned and described; that the purchase or delivery of actual cotton was never contemplated either by the defendant or the said Moody and Jemison, and it was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price and the market price of said cotton futures, according to the fluctuations in the market; and, therefore, the defendant says that the said contract was a wagering

contract, and that it and the said four notes for the consideration aforesaid are void and of no force in law.

And this he is ready to verify; wherefore he prays judgment, &c.

JAMES M. MATTHEWS, *P. D.*

CLERK'S OFFICE OF CIRCUIT COURT OF THE UNITED STATES, EAST. DISTRICT OF VIRGINIA,
RICHMOND, *June 2nd*, 1885.

G. W. Embrey personally appeared before me, clerk of said court, and made oath that the above plea he believes to be true, and
37 that he will be able at the trial of the cause to produce sufficient evidence to support the said plea, and that he is advised by counsel to file the said plea.

M. F. PLEASANTS, *Clerk.*

I do hereby certify, as counsel for the said G. W. Embrey, I advised him to file the above plea.

JAMES M. MATTHEWS, *P. D.*

And on the same day, to wit, on the 2nd day of June, A. D. 1885, came the defendant, by his attorney, and sued out of the clerk's office of the said circuit court of the United States a summons to answer interrogatories against the said plaintiff, which summons, with the interrogatories thereto appended and the return of the marshal thereon, is as follows, viz:

Summons to Answer Interrogatories.

UNITED STATES OF AMERICA, *Eastern District of Virginia*, } *ss:*

The President of the United States of America to the marshal of the eastern district of Virginia, Greeting:

We command you to summon E. S. Jemison, if he shall be found in your district, to answer upon oath the several interrogatories propounded to him by G. W. Embrey in a certain action of debt now pending and undetermined in the circuit court of the United States for the eastern district of Virginia, holden at Richmond, in
38 the district aforesaid, in which the said E. S. Jemison is plaintiff and the said G. W. Embrey is defendant, a copy of which said interrogatories is appended to this summons, to make return of his answers to the said several interrogatories to the clerk of the said court within fifteen days from the date of this summons; and this he shall in nowise omit under the penalty of the law in that case made and provided; and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States, at Richmond, this 2nd day of June, in the year of our Lord 1885, and of our Independence the 109th.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Interrogatories Appended to Above Summons.

1. What was the consideration for the four negotiable notes executed by me on the 21st day of January, 1878, to Moody and Jemison, on which you instituted your suit against me?

2. When did Moody and Jemison purchase for me in the New York Cotton Exchange four thousand bales of future-delivery cotton, commonly called "futures," for May delivery in 1877, and what was the price paid and from whom were they purchased?

3. How much cash margin had I in the hands of Moody and Jemison when they bought for me the four thousand bales of cotton futures aforesaid?

39 4. Did or did not Moody and Jemison, at any time after said purchase, either buy or sell for my account any more futures or enter into any business engagement with me prior to the execution of the four negotiable notes aforesaid?

5. On what day in March, 1877, was it that you called on me in the morning and informed me that my margin for said cotton futures was about exhausted by the decline in the market, and asked me if I had any more margin to put up, and when I replied that I had no more margin to put up and suggested to you to take the said cotton futures yourself, and that I thought in the end they would make you some money?

6. Did you or did you not consider that my connection with the said cotton futures ended with my acknowledged inability to furnish any more margin?

7. Did you or did you not, subsequently to your interview with me about margin, manage and dispose of the four thousand bales of May futures for your own account; and, if not, did you at any time thereafter ever have or seek any interview with me about them, either as to margin, management, or disposition, or profit, or loss concerning them; and, if so, when and what was the nature of the interview?

8. Did I or did I not make any new arrangement or contract with you to carry the four thousand bales of May futures

40 after I informed you of my inability to furnish more margin, and is it or not the universal custom in all cases when more margin is not furnished and no new contract is made to have the futures carried—to close out the purchase at once—or assume the responsibility of all loss that may follow?

9. Is it not a rule of the New York Cotton Exchange that on notice being given of inability to furnish more margin that all contracts shall be closed out on that day or next day. And, if not, state what is the rule or custom prevailing.

10. If you held the four thousand bales of futures for my account state the time you sold them out, at what price, and the name of the purchaser.

11. If you carried the futures for my account till they matured and received cotton on them state who delivered it to you, who paid for it, and what you did with it.

12. Is it or is it not the fact that when you purchased the four thousand bales of May futures it was understood between us that actual cotton was not to be delivered or received, and that the settlement was to be based entirely on the difference between the purchase price and the closing-out price of the futures; and, if actual cotton was to be received, what arrangement was made, if any, for paying for the cotton?

13. Had you or had you not, at any time prior to the pur-
41 chase of the four thousand bales of May futures, ever bought or sold any futures for me; and, if you did, were they settled by paying differences or by receiving or delivering cotton; and, if by differences, was it not the fact that the understanding between us at the time of the purchase of the four thousand bales of May futures was the same as in respect to the previous transactions?

14. Is it not the understanding in the purchase or sale of futures, where a margin only is furnished, that the settlement is to be made by selling out the purchases and paying the difference between the purchase price and the selling price to the purchaser if sold at a profit; and, if sold at a loss, that the purchaser shall pay the difference between the said prices?

15. Is it not the fact that when actual cotton is bought for future delivery that an arrangement is made for the payment of its value or cost, and when a "future delivery" is bought and settlement by differences is all that is contemplated, that an arrangement is made for a margin only to protect the purchaser against the fluctuations in the market?

16. Is it not the universal custom to report sales of futures as soon as made, and to furnish account of sale thereafter as soon as practicable?

17. Did you, at any time after the purchase of the four thousand bales of May futures, ever render any report of the sale of them; and, if so, when, where, to whom, and in what manner?

42 18. When I signed the four negotiable notes aforesaid, to wit, on the 21st day of January, 1878, was it not on the same day I concluded an arrangement with you to go to New Orleans, if I preferred that place, and send orders for futures to you for execution for the account of others, and was it not a fact well known to you, that I was financially embarrassed, and did you or not advance me one hundred dollars to enable me to leave New York, and say to me after we had concluded our business arrangement that you wanted me to sign four notes for "loss on those futures," that you would send two of them to Moody, which he could do with as he pleased, that Mr. Drum would fix up the notes, after which you immediately left the office; and is it not a fact that I made no remark of assent or dissent to you about the matter, and that you believed that my financial embarrassment was so great that I would sign the notes, whether I considered them just or unjust, rather than have the business arrangement disturbed by my refusal to sign and remain in the embarrassed condition I was in; and that you have never at any time since I signed the notes, whether in our correspondence or personal association or through others, referred to these

notes or asked payment of me, and that you desired the notes
43 in order to control my share of the commissions in the business we had arranged for, and without any expectation or purpose of collecting the notes from me?

19. Did you or not say to me in your office in New York, in the first half of April, 1877, unsolicited, that Moody and Jemison had that day closed out every future transaction they had in the market; and was it not a fact that May futures were on that day worth from 11.50 to 11.60, and that they would have to sell as low as about 10.90 to make the loss on the four thousand bales of May futures equal to the aggregate amount of my four negotiable notes aforesaid?

20. Were you not one of the firm of Moody and Jemison, the payees and alleged indorsers of the negotiable notes aforesaid?

21. Were not Moody and Jemison, individually, members of the New York Cotton Exchange in the years 1876 and 1877?

And the said defendant calls upon the plaintiff to answer the said interrogatories in solemn form, on his oath or affirmation.

Dated this 28th day of May, 1885.

JAMES. M. MATTHEWS,
Attorney for Defendant.

Marshal's Return to Foregoing Summons.

Executed by delivering a copy to James Lyons, Jr., att'y for E. S. Jemison, this the 3d day of June, 1885.

JNO. H. OVERBY,
Sp. Dep't- U. S. Marshal.

44 And on another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 6th day of June, 1885.

E. S. JEMISON & Co. *v.* G. W. EMBREY.

In debt.

On the motion of the plaintiff, it is ordered that the interrogatories herein filed by the defendant June 2nd, 1885, be stricken out, and that the defendant pay to the plaintiff the costs of this proceeding.

RO. W. HUGHES, *Judge.*

And on the same day, to wit, on the 6th day of June, 1885, came the plaintiff, by his attorney, and filed his replication to the defendant's special plea of wager, as follows:

Replication to Special Plea of Wager.

And the said plaintiff, by his attorney, James Lyons, comes and says that he, by reason of anything in the special plea of wager alleged by the defendant, ought not to be barred from having and maintaining his action aforesaid against the said defendant, because

he says that the said notes in the declaration mentioned were made by the said G. W. Embrey for a good and legal consideration, to wit, for money paid by the said payees of the said notes for
45 the use of the said G. W. Embrey at his special instance and request, and for money found to be due them by the said Embrey on an account then and there stated between them, and not in pursuance of or upon the said agreement or for the purpose in the said special plea of the said defendant mentioned, in manner and form as the said defendant hath therein alleged.

And this the said plaintiff prays may be enquired of by the country.

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 22nd day of July, 1885.

E. S. JEMISON & Co. *v.* G. W. EMBREY.

In debt.

On the motion of the defendant, and legal notice of this motion being proved to have been given the attorney for the plaintiff, who is a non-resident, it is ordered that the plaintiff produce at the trial of this cause, on the second day of the October term next of this court, the several books mentioned and described in the "Statement A" attached to the said notice, a copy of which was served with the said notice on the said attorney for the plaintiff, and that a copy of this order and the said statement be personally served on the
46 plaintiff.

RO. W. HUGHES, *Judge.*

"STATEMENT A." (Referred to in above order.)

1. The contract book, commonly called the "Cotton Blotter" or "Future Book," which shows when all the purchases and sales of cotton futures made by said Moody and Jemison to the defendant, G. W. Embrey, were first made, number of bales, prices, months, date of purchase or sale, and name of purchaser or seller in the New York Cotton Exchange.

2. The contract book, commonly called "Margin Book," which shows a memorandum of the purchases or sales of each customer, price, and amount of margin furnished.

3. The contract book, commonly called "Contract Ledger," which shows the account of the purchases and sales of each customer, prices, and when and how settled.

4. The contract book, commonly called "Cotton Contract Book," which shows the purchases and sales of cotton futures for each month of the year, number of bales bought or sold for each month, prices, from whom bought and to whom sold in the New York Cotton Exchange, name of customer for whom each purchase or
47 sale was made, date of ring settlement of each purchase or sale, and amount of differences paid in settlement.

5. The contract book, commonly called "Cotton Contract and Margin Book," which shows the purchases and sales of futures made with firms in the New York Cotton Exchange, prices, amounts, and settlements.

6. Letter book, which shows advices of the purchases and sales of futures for customers.

7. Invoice or account of sales book, which shows the reports of profits or losses on sales and purchases of futures for customers where settlement is made.

8. Cash book, journal, and general ledger, which show all credits given, cash loaned or received, and statement of account of each customer.

G. W. EMBREY,
By Counsel.

Return of Marshal to Foregoing Notice

I hereby certify that on the 14th day of August, 1885, at the city of New York, in my district, I personally served the within order & Statement A upon the within-named E. S. Jemison by exhibiting to him the within original and at the same time leaving with him a copy thereof.

Dated August 14th, 1885.

MARTIN T. McMAHON,
U. S. Marshal, Southern Dist. of New York.
By GEORGE JEFFERY,
Dep. U. S. Marshal.

48 And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on September 16th, 1885.

E. S. JEMISON & Co., Pl't'ff, *v.* G. W. EMBREY, Def't.

In debt.

On the motion of the plaintiff, leave is given him to withdraw his replication to the defendant's special plea of wager, on which no issue has been joined; and thereupon, by leave of court, the plaintiff filed his demurrer to the defendant's special plea of wager, and the defendant joined in the demurrer, and the same is continued and set for hearing at the October term.

RO. W. HUGHES, *Judge.*

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 8th day of October, A. D. 1885.

This day came the plaintiff, by Legh R. Page and James Lyons, his attorneys, and the defendant likewise, by his attorneys, Joseph Christian and James M. Matthews, and thereupon the plaintiff's demurrer to the defendant's special plea of wager being ar-

49 gued, it seems to the court that the said special plea of wager and the matters therein contained are not sufficient in law

to bar or preclude the plaintiff from having and maintaining his action aforesaid against the defendant; therefore it is considered by the court that the demurrer to the said special plea of wager be sustained.

RO. W. HUGHES, *Judge.*

And at another day, to wit, at a circuit court of the United States for the district aforesaid, held at Richmond aforesaid on the 9th day of October, the following orders were entered, viz:

E. S. JEMISON & Co., Plaintiff,
vs.
G. W. EMBREY, Defendant. } 1486.

In debt.

On the motion of the plaintiff and for reasons in the discretion of the court, the order herein entered on July 22nd, 1885, for the production of books by the plaintiff is set aside.

RO. W. HUGHES, *Judge.*

This day came again the parties, by their attorneys, and, issue being joined, thereupon came a jury, to wit, Henry L. Cabell, Goodman Davis, B. Harris, Jr., B. R. Lipscomb, R. F. Walker, J. B. Foster, Jr., John H. Smith, T. N. White, William Kelley, T.
50 Seddon Bruce, Joseph Williams, and Gabriel Farish, who, having been duly selected and sworn to try the issue joined, and having heard the evidence and arguments of counsel, on their oath returned a verdict as follows:

"We, the jury, find for the plaintiff, and upon our oath do say that the defendant doth owe the plaintiff the debt, principal and interest, in the declaration demanded."

And thereupon the defendant, by his counsel, moved the court to dismiss this cause for want of jurisdiction, on the ground that the defendant, at the time of the institution of this suit, was not a citizen of the State of Virginia, but was then and is now a citizen of the State of Louisiana; the hearing of which motion is continued until the 21st day of this month.

And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, this 23d day of October, 1885.

E. S. JEMISON & Co., Plaintiff,
vs.
G. W. EMBREY, Defendant. } 1486.

In debt.

This day came the plaintiff, by Legh R. Page and James Lyons, his attorneys, and the defendant likewise, by his attorneys,
51 Joseph Christian and James M. Matthews, and thereupon the defendant's motion to dismiss for want of jurisdiction was

withdrawn, and the motions of the defendant for a rehearing and for a new trial filed in writing, and the defendant's motion in arrest of judgment being heard and argued, the court doth overrule all the said motions; to which rulings of the court the defendant, by his counsel, excepts.

Therefore it is considered by the court that the plaintiff recover against the defendant the sum of $30,376.61, with interest, at the rate of six per centum per annum, on $15,188.30, part thereof, from the 25th day of July, in the year 1878, and on $15,188.31, residue thereof, from the 25th day of January, 1879, until paid, and his costs.

RO. W. HUGHES, *Judge.*

The following bills of exceptions were filed in this cause:

Bill of Exceptions No. 1.

Be it remembered that, upon the arguments of counsel on the demurrer filed by the plaintiff to the amended plea of wager filed by the defendant in this cause, the court sustained the said
52 demurrer to which judgment of the court sustaining the said demurrer; and rejecting the said plea the defendant, by his counsel, excepted and tendered this his bill of exceptions, which he prays may be signed, sealed, and made a part of the record in this cause, which is accordingly done.

RO. W. HUGHES, *Judge.* [SEAL.]

Bill of Exceptions Number 2.

Be it remembered that after the rejoinder of the defendant to the special replication of the plaintiff to the plea of the statute of limitations was rejected by the court at the last term, after full argument, the defendant then filed another special plea of wager, to which the plaintiff demurred, and, the cause coming on at this term to be heard upon the issue joined, the defendant, before said hearing, moved the court for leave to file another rejoinder to plaintiff's replication to said plea of the statute of limitations; which said rejoinder is in the words and figures following, to wit:

Second Rejoinder to Plaintiff's Replication to Plea of Act of Limitations.

53 The defendant says that the plaintiff ought not, by reason of anything in his replication alleged, to have and maintain his action against him, because he says that by his removal from the State of Virginia and departing without the same, as in his said replication is alleged, he did not obstruct the said plaintiff in the prosecution of his action upon the alleged causes of action in the declaration mentioned, because he says that his removal from the State of Virginia and departing without the same was a long time prior to the existence of any of the alleged causes of action against him and before they accrued to the plaintiff or to the firm of Moody

& Jemison against this defendant, and that when said causes of action accrued to the plaintiff or to the said firm of Moody & Jemison the defendant was not a citizen or resident of Virginia, but was and still is a citizen and resident of the State of Louisiana; and this he is ready to verify, &c.

MATTHEWS & CHRISTIAN, *P. Q.*

But the court overruled said motion; to which ruling the
54 defendant, by his counsel, excepted and tendered his bill of exceptions, which he prays may be signed, sealed, and made a part of the record, which is accordingly done.

RO. W. HUGHES, *Judge.* [SEAL.]

Bill of Exceptions No. 3.

Be it remembered that before the jury was sworn to try the issue joined in this cause on the plea of *nil debet* the defendant, to maintain the issue on his part, by his counsel, moved the court to require the plaintiff to produce in court the several books which the court, by its order made in this cause on the 22d day of July, 1885 (a copy of which had been duly served on the plaintiff), had required the plaintiff to produce at the trial of this cause; and, the arguments of counsel having been heard on the said motion, the court overruled the said motion and set aside the said order requiring the production of said books, it appearing to the court that said order was improvidently issued, that the books therein called for were not in plaintiff's possession, and that the matter thereby sought to be
55 proved was not pertinent to the issue; to which said rulings of the court the defendant, by his counsel, excepted and tendered this his bill of exceptions, which he prays may be signed, sealed, and made a part of the record in this cause, which is accordingly done.

RO. W. HUGHES, *Judge.* [SEAL.]

Bill of Exceptions No. 4.

Be it remembered that, after the court had refused to grant the defendant leave to file at this term another rejoinder to the plaintiff's special replication to the plea of the statute of limitations, the defendant, having at the last term pleaded *nil debet* and filed a special plea, to which special plea the plaintiff had demurred and had taken issue upon the plea of *nil debet*, and the cause having been fixed and called for trial, *the defendant* then, but before the jury was sworn, asked leave to take issue upon the plaintiff's special replication to the plea of the statute of limitations filed at the last term, but the court refused to grant such leave; to which refusal the defendant excepted and tendered this his bill of exceptions,
56 which he prays may be signed, sealed, and made a part of the record, and the same is accordingly done.

RO. W. HUGHES, *Judge.* [SEAL.]

Bill of Exceptions No. 5.

Be it remembered that after the jury were sworn to try the issue joined in this cause on the plea of *nil debet* the plaintiff, to maintain the said issue on his part, gave in evidence to the jury the four several negotiable notes mentioned and described in his original and amended declarations in this cause; and thereupon the defendant, to maintain the said issue on his part, testified to the jury that on the 1st day of March, 1877, he purchased through the plaintiff, as one of the firm of Moody & Jemison (brokers and commission merchants of the city of New York), members of the New York Cotton Exchange, whom he employed to make said purchase on a margin, four thousand bales of future-delivery cotton for May delivery, commonly called "futures;" that at the time of the said purchase the defendant had in the hands of said Moody & Jemison about $8,000, which stood as and was a margin to protect the
57 said purchase against the fluctuations of the market; that about the said first of March, 1877, the plaintiff reported to the defendant that the margin was about exhausted by decline in the market, and called on the defendant for more margin, which the defendant informed him he was unable to put up, and did not put up; that no agreement was at the time or afterwards made by the defendant with the said firm of Moody & Jemison to have the said cotton futures carried for his account; that no report was ever made afterwards to the defendant of any sale of the said cotton futures until the 21st day of January, 1878, when the said plaintiff, as one of the firm aforesaid, called on the defendant for his four notes for losses which he alleged that the said firm had sustained by carrying the said cotton futures, which notes the defendant executed and which are the identical notes mentioned in the plaintiff's declaration; that the purchase or delivery of actual cotton was never contemplated either by the defendant or the said Moody and Jemison, as his brokers, and it was understood between them that the settlement was to be made between said parties by one party paying to the other the difference between the contract price
58 and the market price of said cotton futures, according to the fluctuations in the market; which was all the evidence introduced before the jury.

Whereupon the counsel for the defendant moved the court to give the following instructions to the jury, to wit:

Instructions.

The court instructs the jury:

If the jury shall believe from the evidence that it was not the intention of either party that a contract should be made by the plaintiff to buy and hold the — bales of cotton for delivery to the defendant, but that it was the real intention and understanding of the parties that a contract should be made which should be closed at a future day, not by delivery of the cotton and payment of purchase

price, but by payment of money to the one party or the other, the party to receive the same and the amount to be paid to be determined upon a basis of the difference between the agreed purchase price on the — day of ——, 18—, and the actual market value of the cotton on the day when the contract was to be closed, then the jury are instructed that such a contract is invalid in law and
59 void, and that they must find for the defendant.

Which instructions the court refused to give; to which refusal of the court to give the said instructions to the jury the defendant, by his counsel, excepted, and tendered this his bill of exceptions, which he prays may be signed, sealed, and made a part of the record in this cause, and the same is done accordingly.

RO. W. HUGHES, *Judge.* [SEAL.]

Bill of Exceptions No. 6.

Be it remembered that after the jury had rendered their verdict in this cause the defendant, by his counsel, moved the court to arrest its judgment on the said verdict, on the ground of errors in law apparent on the face of the record in this cause, and the arguments of counsel having been heard on the said motion, the court refused to arrest its judgment on the said verdict; to which refusal of the court the defendant, by his counsel, excepted, and tendered this
60 his bill of exceptions, which he prays may be signed, sealed, and made a part of the record in this cause, which is done accordingly.

RO. W. HUGHES, *Judge.* [SEAL.]

61 *Assignment of Error and Prayer for Reversal.*

Supreme Court of the United States, of October Term, in the year of our Lord one thousand eight hundred and eighty-six.

G. W. EMBREY

vs.

E. S. JEMISON, Doing Business under the Firm Name and Style of E. S. Jemison & Co.

In error.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said G. W. Embrey, by Joseph Christian and James M. Matthews, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. In sustaining the demurrer of the plaintiff to the defendant's amended plea of wager, as set forth in the defendant's first bill of exceptions.

2nd. For refusing leave to the defendant to file another rejoinder to the plaintiff's replication to the defendant's plea of the statute of limitations, as set forth in the defendant's second bill of exceptions.

3rd. For overruling the motion of the defendant to require the plaintiff to produce in court the several books which the court, by its order made on the 22nd day of July, 1885, had required the plaintiff to produce at the trial of this cause, and for setting aside the said order, as set forth in the defendant's third bill of exceptions.

62 4th. For refusing leave to the defendant to take issue upon the plaintiff's special replication to the defendant's plea of the statute of limitations, and that, too, after leave had been refused the defendant to file another rejoinder to the said plea, as set forth in the defendant's fourth bill of exceptions.

5th. For refusing the instruction to the jury asked for by the defendant, as set forth and embodied in the defendant's fifth bill of exceptions.

6th. For overruling the defendant's motion in arrest of judgment on the verdict, as set forth in the defendant's sixth bill of exceptions.

7th. For refusing the new trial asked for by the defendant, as stated in the order made on the 23rd day of October, 1885.

8th. There is error also, in this, that by the record aforesaid it appears that the judgment aforesaid given was for the said Jemison against the said Embrey, whereas by the law of the land the said judgment ought to have been given for the said Embrey against the said Jemison; and the said Embrey prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

JOS. CHRISTIAN,
JAMES M. MATTHEWS,
Attorneys for Plaintiff in Error.

63 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you or some of you, between E. S. Jemison, plaintiff, and G. W. Embrey, defendant, a manifest error hath happened, to the great damage of the said G. W. Embrey, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and ac-

cording to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 22d day of January, in the year of our Lord one thousand eight hundred and eighty-six.

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States.

Allowed by—
RO. W. HUGHES, *Judge.*

64 Know all men by these presents that we, G. W. Embrey and —— Haynes, are held and firmly bound unto E. S. Jemison in the full and just sum of six hundred dollars, to be paid to the said E. S. Jemison, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-second day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at a circuit court of the United States for the eastern district of Virginia, in a suit depending in said court between E. S. Jemison, plaintiff, and G. W. Embrey, defendant, a judgment was rendered against the said G. W. Embrey and the said G. W. Embrey, having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said E. S. Jemison, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said G. W. Embrey shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

G. W. EMBREY, [SEAL.]
By JOS. CHRISTIAN, [SEAL.]
His Att'y-in-Fact.
GEORGE A. HAYNES. [SEAL.]

Sealed and delivered in presence of—
M. F. PLEASANTS, *Clerk.*

Approved by—
RO. W. HUGHES, *Judge.*

A copy.
Teste: M. F. PLEASANTS, *Clerk.*

65 The United States of America to E. S. Jemison, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on

the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein G. W. Embrey is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable M. R. Waite, Chief Justice of the Supreme Court of the United States, this 22nd day of January, in the year of our Lord one thousand eight hundred and eighty-six.

RO. W. HUGHES, *Judge.*

66 On this — day of ——, in the year of our Lord one thousand eight hundred and eighty- —, personally apppeared —— —— before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the —,A. D. 188–.

—— ——.

Service of this citation acknowledged this 15th day of March, 1886.

LEGH R. PAGE,
Counsel for E. S. Jemison.

67 UNITED STATES OF AMERICA, }
Eastern District of Virginia, } *ss:*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true and complete transcript of the record and proceedings in the cause in the caption hereof mentioned as the same remains on the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 15th day of March, 1886.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS, *Clerk.*

Endorsed on cover: E. Virginia C. C. U. S. No. 235. G. W. Embrey, plaintiff in error, *vs.* E. S. Jemison. Filed March 18, 1886.

U. S.
MAR 5 1900

Supreme Court of the United States.

G. W. EMBREY, *Pl'tiff in Error*,
v.
E. S. JEMISON, doing business under the name of E. S. Jemison & Co., *Def't in Error*.

DOCKET NO. 235.

Brief for Plaintiff in Error.

WARE, DUKE & TAYLOR, PRINTERS, 1208 MAIN STREET, RICHMOND.

Supreme Court of the United States.

G. W. EMBREY, *Pl'ff in Error*,
v.
E. S. JEMISON, doing business under the name of E. S. Jemison & Co., *Def't in Error*.

DOCKET No. 235.

Brief for Plaintiff in Error.

I.

STATEMENT OF THE CASE.

This is an action of debt, instituted on the 8th day of November, 1884, in the Circuit Court of the United States for the Eastern District of Virginia, at Richmond, by E. S. Jemison, citizen of the State of New York, doing business under the firm-name and style of E. S. Jemison & Co., plaintiff, against G. W. Embrey, a citizen of the State of Virginia, defendant, for the recovery of $30,306.61 and interest, on four negotiable notes aggregating that sum, executed by said Embrey on the 21st January, 1878, in the city and State of New York, made payable to the order of Moody & Jemison, two of the said notes, each for the sum of $7,594.15, being made payable at six months after date, and the other two, for the sum of $7,594.15 and $7,594.16, respectively, at twelve months after date.

On the day of the institution of the suit the plaintiff (defendant in error) filed his declaration, and at the January rules, 1885, the defendant (plaintiff in error) appeared by counsel, and filed a general demurrer to the plaintiff's declaration, and, also, the pleas of *nil debit* and the act of limitations.

At February rules, 1885, the plaintiff appeared and moved for judgment, because the pleas filed by the defendant were without affidavit or certificate of counsel, as required by the 11th rule of the court, and the demurrer did not set forth the cause of the demurrer on its face, as required by the 18th rule of the court. (See record, pp. 5–6.)

By direction of the court the clerk entered judgment *nunc pro tunc*, as of January rules, 1885, against the defendant, for the debt and interest aforesaid and the plaintiff's costs; which judgment, on the motion of the defendant, the court, on the 17th of February, 1885, "for reasons within its discretion," set aside, and allowed the defendant to file a special demurrer to the plaintiff's declaration, and also the plea of *nil debit*, the plea of the act of limitations, and a special plea in writing, which were accordingly filed. (See pp. 6–8 of record.)

On the 7th of April, 1885, on the motion of the plaintiff, leave was given him to file an amended declaration, which was accordingly filed. (See pp. 9–12 of record.)

To this amended declaration the defendant filed a special demurrer, also the plea of the act of limitations, the plea of *nil debit*, and the special plea of wager. (See pp. 12–14 of record.)

On the 15th April, 1885, the defendant, by leave of the court, withdrew his demurrer to the amended declaration, and the plaintiff, with like leave, filed a special replication to the defendant's plea of the act of limitations to said declaration, to which the defendant filed a special rejoinder; and the plaintiff filed a special demurrer to the defendant's plea of wager to said amended declaration, and the defendant joined in said demurrer. The court, on argument being heard, sustained the demurrer to the plea of wager, and gave leave to the defendant to amend his said plea. The plaintiff then replied generally to the plea of *nil debit*, and issue was joined between the parties as to this plea. (See pp. 14–15 of record.)

On the next day, the 16th April, 1885, the defendant

filed his special rejoinder to the special replication of the plaintiff to the plea of the act of limitations, and on the 9th May, 1885, the court, on motion of the plaintiff, for reasons stated in writing as a part of its order, rejected the said rejoinder. (See pp. 15–17 of record.)

On the 2d June, 1885, the defendant filed his amended plea of wager (see p. 17 of record), and on same day filed interrogatories in writing in the said cause, and sued out a summons against the plaintiff to answer the said interrogatories (see pp. 18–21 of record). These interrogatories were, afterwards, stricken out by order of the court. (See p. 21 of record.)

On the 6th of June, 1885, the plaintiff filed his replication to the defendant's plea of wager. (See pp. 21–22 of record.)

On the 22d July, 1885, on the defendant's motion, (of which the plaintiff had legal notice,) it was ordered that the plaintiff produce, at the trial of this cause, the several books mentioned in a certain statement, marked "A," attached to the notice. (See pp. 22–23 of record.) This order the court afterwards—to-wit, on the 22d July, 1885—on the plaintiff's motion, set aside. (See p. 24 of record.)

On the 16th September, 1885, leave was given the plaintiff to withdraw his replication to the defendant's plea of wager, on which no issue had been joined, and thereupon, by leave of the court, the plaintiff filed his demurrer to the said plea of wager, and the defendant joined in the said demurrer. And at another day—to-wit, on the 8th October, 1885—the court, having heard the arguments of counsel on said demurrer, sustained the said demurrer to the said plea of wager. (See pp. 22–23 of record.)

At the October term, 1885, a jury was sworn to try the issue joined (on the plea of *nil debit*), and brought in a verdict for the plaintiff, against the defendant, for the debt and interest in the declaration demanded. Thereupon, the defendant moved the court to dismiss the cause for want of jurisdiction, on the ground that the

defendant, at the time of the institution of the suit, was not a citizen of the State of Virginia, which motion was continued until the 21st of said month, on which day it was withdrawn, and the motion of the defendant for a new trial and arrest of judgment overruled, to which the defendant excepted, and the court gave judgment upon and according to the verdict. (See pp. 24–25 of record.)

During the trial of the cause the defendant filed six several bills of exception to the rulings of the court, which will be particularly noticed, so far as is necessary, in the assignments of error. (See pp. 27–28 of record.)

II.

SPECIFICATION OF ERRORS RELIED UPON, AND BRIEF OF THE ARGUMENT IN RESPECT TO EACH SPECIFICATION.

First Specification of Error.

In sustaining the demurrer of the plaintiff to the defendant's amended plea of wager, as set forth in the defendant's first bill of exceptions.

The statute laws of Virginia, provide that "every contract, conveyance, or assurance, of which the consideration, or any part thereof, is money, property, or other thing won or bet at any game, sport, pastime, or wager, or money lost or advanced at the time of any gaming, betting, or wagering, to be used in being so bet or wagered (where the person lending or advancing it knows that it is to be so used) shall be void." (Code of Va., 1873, p. 984, § 2.) This statute is applicable to this case, for it is provided by act of Congress of the United States that "the laws of the several *States*, except where the Constitution treating on statutes of the United States otherwise require or provide, shall be regarded as *rules of decision in trials at common law in the courts of the United States*, in cases where they apply." (Rev. Stat. U. S., 2d ed., § 721.)

The defendant's amended plea of wager sets forth

that his several negotiable notes on which the plaintiff instituted his suit were given in consideration of money lost at wager, which he was ready to verify, and the right to do which and prove the illegality of the consideration has been denied him by the overruling of his said plea in sustaining the demurrer. Tested by the authorities, the contract alleged by the defendant in said plea is a contract of wager, and null and void. (See Benjamin on Sales, §§ 541, 542; Cook on the Law of Stocks and Stockholders, § 347; Irwin *v.* Williar, 110 U. S. R., 499.)

Second Specification of Error.

For refusing leave to the defendant to file another rejoinder to the plaintiff's replication to the defendant's plea of the statute of limitations, as set forth in the defendant's second bill of exceptions.

The defendant, in his plea of the act of limitations, alleged that the plaintiff's cause of action did not accrue to him within five years next before the commencement of his suit. To this plea the plaintiff replied by saying that at the time when the right of action did accrue to him "the defendant had before resided in the State of Virginia, and did, by departing without the same, obstruct the said plaintiff in the prosecution" of his action for two or more years after the same accrued, and that, by excluding the time of the obstruction, the plaintiff brought his action within the five years next after the same accrued. This replication is to be found on page 15 of the record.

This replication was prepared and filed under the 20th section of ch. 146, Code of Virginia, on "Limitation of Suits," p. 1002, which reads as follows:

"§ 20. Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct

the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

To the above replication the defendant offered a special rejoinder, and asked for leave to file the same, which the court refused. This rejoinder admitted the fact alleged in the plaintiff's replication that "the defendant had before resided in this State," and had "departed without the same," but denied that his departing from the State *obstructed* the plaintiff in his action, because his departing without the same was *prior* to the existence of any of the alleged causes of action against him and *before they accrued.* (See pp. 25–26 of record for the rejoinder.)

The above statute was construed by the Court of Appeals of Virginia in Ficklin's Ex'or *v.* Carrington, 31 Grat., 219, in which it was held that "where a debtor who resides in the State removes, *after contracting the debt*, to another State, the removal is itself an obstruction to the prosecution of a suit by the creditor to recover the debt, and the statute of limitations will not run against the debt while the debtor resides out of the State." The court in this case had occasion to review former statutes on the subject, among others the statute found in 1 Rev. Code of Va., 1819, p. 491, § 14, which provided that "if any defendant shall abscond or conceal himself, or by removal out of the country or the county where he resides, *when the cause of action accrued*, or by any other indirect ways or means, defeat or obstruct the plaintiff, then the defendant, shall not be admitted to plead the statute of limitations," and expressed the opinion that the modification in the structure and phraseology of the statutes did not change their meaning. In the case referred to the defendant Carrington's removal from the State was *after* the cause of action had accrued against him. This fact was not controverted. The main question considered by the court, bearing this fact in mind, was whether the removal

of the defendant to another State was of *itself* an obstruction to the prosecution of the suit. The court held that it was.

It will be seen from the record that after leave had been given by the court to file his first rejoinder to the plaintiff's replication to the plea of the act of limitations, and after the rejoinder had been actually filed under such leave, motion was made by the plaintiff to reject the same "on the authority of Ficklin's Ex'or *v.* Carrington," *ubi supra*, and the court sustained the motion for reasons stated in writing as a part of its order. (See pp. 15–16 of record.) It appears from this writing that the learned judge of the court below was of the opinion that the statute of Virginia (ch. 146, § 20, Code of 1873, before cited) "contemplates the case of a non-resident who enters into a contract *after* removing from the State," though he was inclined to think that this was not the intention of the Legislature. Coming to this conclusion, it was not remarkable that he should have added: "Strangely enough the defendant in his rejoinder pleads the very condition of things in defence which the law declares shall not be a defence under the general statute of limitations." The learned judge ignored the word "obstruct," the significant and vital word of the statute. If a person enters into a contract after his removal from one State to another, he may be sued in the State to which he removed. There is no obstruction to the action. The removing from Virginia cannot be regarded as obstructing the action in Virginia, where the contract was entered into after the removal, and in another State, for at the time of removing, there was no contract in existence. The statute clearly contemplates the case of a removing from the State of Virginia (when the contract was made in that State) *after* the right of action had accrued, and no other. The contract in this case was made in the State of New York.

Third Specification of Error.

For refusing leave to the defendant to take issue upon the plaintiff's special replication to the defendant's plea of the statute of limitations, and that, too, after leave had been refused the defendant to file another rejoinder to the said plea, as set forth in the defendant's fourth bill of exceptions.

The replication of the plaintiff is a plea of confession and avoidance, and, properly, concludes with a verification. The defendant, in his turn, could either demur to this replication, confess and avoid its allegations, or plead by way of traverse, and tender issue. (Stephen on Pl., 3d Am. Ed. [Tyler], 93-'4.) The defendant did not choose to demur, but pleaded in confession and avoidance. This plea was rejected by the court. He certainly had the right then to plead by way of traverse, and tender issue, otherwise no issue could be made on the plaintiff's replication.

The replication alleged a new fact—that the plaintiff was obstructed in his action for a certain time by the defendant's departing from the State. There can be no issue of fact until some specific point or matter affirmed on the one side is *denied* on the other. (*Id.*, 59.)

The court below, by refusing to permit the defendant to tender issue on this replication, virtually said to him: "You shall not deny the matter which it affirms, and throw upon the plaintiff the *onus* of proof, but the plaintiff shall have the benefit of his replication to your plea, without verification." It will thus be seen that the question of fact raised by the replication has never ripened into an issue, and, though one of vital importance to the defendant, has never been submitted to a jury. The jury can take no matter into consideration but the question in issue, for it is to try the issue, and that only, that they are summoned.

Fourth Specification of Error.

For overruling the motion of the defendant to require the plaintiff to produce in court the several books which the court, by its order made on the 22d day of July, 1885, had required the plaintiff to produce at the trial of this cause, and for setting aside the said order, as set forth in the defendant's third bill of exceptions.

The defendant's motion to require the plaintiff to produce the books was made under sec. 724, Rev. St. U. S., which confers on the courts of the United States authority to "require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."

The above order to produce the books was afterwards, on the plaintiff's motion, "for reasons in the discretion of the court," set aside. (See p. 24 of record.) In the defendant's bill of exceptions to this ruling of the court it is stated that the order was set aside because it appeared to the court that it was "improvidently issued; that the books therein called for were not in plaintiff's possession, and that the matter thereby sought to be proved was not pertinent to the issue." (See p. 26 of rec.)

How it appeared to the court below that the books called for were not in "*possession*" of the plaintiff, we do not know. It is not asserted or pretended that they were not in his "power," and, if so, obedience to the order to produce them should have been required. That the matter sought to be proved was pertinent to the issue on the plea of wager is too plain for argument. To that plea the plaintiff had filed his rejoinder and put himself on the country before the order was made for the production of the books. (See pp. 21–22 of record.) The order was not therefore improvidently issued, and not made so by the subsequent withdrawal of the re-

joinder and rejection of the plea. The plea of *nil debit* remained, on which issue had been taken, and there is hardly any matter of defence to an action of debt on simple contract to which this plea may not be applied, because almost all defences resolve themselves into a denial of the debt. The defendant expected to show by the books that there was no consideration for the notes.

Fifth Specification of Error.

For refusing the instructions to the jury asked for by the defendant, as set forth and embodied in the defendant's fifth bill of exceptions.

These instructions correctly propounded the law of the case as developed by the testimony of the defendant at the trial of the issue on the plea of *nil debit*, and should have been given. The testimony of the defendant is fully set forth in the said fifth bill of exceptions, and certified to by the judge of the court below as *all* the evidence introduced before the jury, except the four notes on which the suit was instituted. (See pp. 27–28 of record.) It shows that the consideration of the notes was founded on a wagering contract, which is invalid in law and void. (Benjamin on Sales, § 541–542, and cases there cited; Irwin *v.* Williar, 110 U. S. R., 499; Pickering *v.* Cease, 79 Ill., 328; Dos Passos, Stock Brokers, 477; Baldwin *v.* Flagg, 36 N. J. Eq. R., 48–49.)

Sixth Specification of Error.

For overruling the defendant's motion in arrest of judgment on the verdict, as set forth in the defendant's sixth bill of exceptions.

As has been seen, the verdict in this case was rendered on the issue on the plea of *nil debit*, the only issue made up in the case, and the only issue which the jury was sworn to try. The record of the verdict states, after giving the names of the jurors, that they were sworn to

try the *issue* joined. The verdict of the jury is responsive to the one issue on the plea of *nil debit*. It says that the jury find for the plaintiff, and "that the defendant doth owe the plaintiff the debt, principal, and interest in the declaration demanded." (See record, p. 24.) The defect apparent on the record, for which the judgment should have been arrested, is that no issue was made up (and none allowed to be made up) on the defendant's plea of the act of limitations.

Seventh Specification of Error.

For refusing the new trial asked for by the defendant, as stated in the order made on the 23d day of October, 1885. (See pages 24–25 of record for this order.)

The defendant moved for a new trial on three grounds—to-wit :

1st. The verdict was contrary to the evidence. The evidence shows (it is set forth in fifth bill of exceptions, p. 27 of record) that the consideration of the notes sued on was founded on a wager contract between Moody and Jemison (the plaintiff) and the defendant, which was null and void in law, according to the authorities before cited.

2d. Because the court refused to give the instruction to the jury which the defendant asked for, which instruction is copied in the said bill of exceptions.

This instruction properly propounds the law in respect to the wager consideration of the notes sued on, and should have been given to the jury. Though the plea of wager had been rejected by the court, yet, under the plea of *nil debit*, on which the issue was tried, any evidence was admissible tending to show that the defendant did not owe the debt claimed by the plaintiff. The jury had the right to infer, as they no doubt did, from the refusal to give the instruction, that the law was not such as the instruction propounded, and that the notes were not given on a wager consideration. Had the

instruction been given, the verdict would have been for the defendant.

That a new trial will be granted for the failure to give proper instructions, as well as for erroneous instructions to the jury, we refer to 3 Graham & Waterman on New Trials (Ed. 1885), 708, *et seq.*, and cases cited.

3d. The last ground for the motion for a new trial was that no issue was joined on the plea of the act of limitations.

In Totty's Ex'or *v.* Donold & Co., 4 Munford (Va.), 430, which was an action of *assumpsit*, the pleas were *non assumpsit* and act of limitations; the plaintiff replied generally to the first plea and specially to the second, but no rejoinder was put in by the defendant.

It was said in the transcript of the record that a jury was impanelled to try the *issues* joined. But it was decided that no issue was joined on the second plea, and therefore that a verdict for the plaintiff should be set aside and a *new trial* directed. (See also B. & O. R. R. Co. *v.* Faulkner, 4 W. Va. R., 180; Griffie *v.* McCoy, 8 W. Va., 201.)

And for the errors aforesaid, the plaintiff ~~defendant~~ in error prays that the said judgment may be reversed and annulled.

JOSEPH CHRISTIAN,
JAMES M. MATTHEWS,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

G. W. EMBREY, Plaintiff in Error. vs. E. S. JEMISON, Defendant in Error.	[No. 235.]

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

BRIEF OF THE DEFENDANT IN ERROR.

Statement of Facts.

The Plaintiff in Error, G. W. Embrey, in the year 1878 being indebted to and owing the firm of Moody and Jemison who had been co-partners in business in the City of New York a large amount of money, made executed and delivered to said firm of Moody and Jemison his four promissory notes dated New York, January 21st, 1878, for $7,594.15 each, two of which notes were payable six months after date thereof, and two notes were made payable twelve months after date thereof. Subsequently the firm of Moody & Jemison dissolved partnership, and E. S. Jemison, in due course of business, became the owner of said notes, all of said notes being endorsed before maturity thereof by Moody & Jemison. A copy of said notes with the endorsement thereon are fully set forth on page 4 of the Record. Plaintiff in Error having failed to pay said notes at maturity, and being at the time of the commencement of this action a resident of the Eastern District of Virginia, an action was commenced in the Circuit Court of the United States for the Eastern District of Virginia and personal service of the summons in this cause was made on said Plaintiff in

Error within said District. (See Return of Marshal, page 1 of Record.) The action was brought to recover the sum of $30,376 61, principal and interest thereon at six per cent. per annum from the date of the maturity of the notes.

The jurisdiction of the Court, depended on the citizenship of the parties. The defendant in error was then and is yet a citizen of the State of New York, the plaintiff in error not being a citizen of the State of New York, but claims that he is a citizen of the State of Louisiana, but being found and served within the Eastern District of Virginia at the time of the commencement of this action, the U. S. Circuit Court under the law then in force obtained jurisdiction of the plaintiff in error—the amount involved being in excess of that required by law.

The plaintiff in error not having appeared a judgment *nisi* was entered against him with leave to plead by the next rule day. On the succeding rule day plaintiff in error filed a general demurrer (R. 5) and two pleas, *nil debet* and Act of Limitations, (R. 5).

At the next Rules judgment was rendered for the full amount of Jemison's claim for want of verification by plaintiff in error of his pleas, and because there was no certificate of counsel as required by rule 11 of that Court. (Record pages 6 and 7).

At the February Rules the judgment was set aside and leave given to the Plaintiff in error to file a special demurrer to the declaration, a plea of *nil debet*, the act of Limitations, and a special plea in writing, which were then filed. (Record, pages 6, 7 and 9.) At the April term leave was given defendant in error to file an amended declaration. (Record 9–12.)

Plaintiff in error subsequently filed his demurrer to the amended declaration, also plea of limitations, a special plea of wager, and a plea of *nil debet*. (R. 12–14.)

April 15, 1885, leave was given plaintiff in error to withdraw his demurrer to the amended declaration. A special replication was filed to his plea of limitation (R. 15), to which he was allowed to file a special rejoinder. The defendant in error filed a demurrer to the plea of wager (R.

15), which was sustained by the Court, and leave given to amend the plea of wager, and issue was joined on the plea of *nil debet.*

May 16th, 1885, the plaintiff in error filed his rejoinder to the special replication to his plea of Limitations (R. 16), which on motion of defendant in error was by the Court rejected (see Record 16), for reason and opinion of the Court below.

June 2d, 1885, plaintiff in error filed his amended plea of wager (R. 17, 18).

June 6th, 1885, the defendant in error filed his replication to the amended plea of wager R. 21 and 22.

July 22d, 1885. Plaintiff in error obtained an order for the defendant in order to produce several books. R. 22-23.

Sept. 15th, 1885. No issue having been joined on the special plea of wager, defendant in error was permitted to withdraw his replication and filed his demurrer thereto in which plaintiff in error joined, the hearing of which was continued until the October term, when the demurrer to said special plea of wager was sustained, (R.23 and 24),and and at the same term the Court revoked and set aside the order entered July 22d for the production of the books. (R. 24.)

The case being at issue it was tried by the Court and a jury, and a verdict rendered for the defendant in error for the full amount of the principal and interest in the declaration demanded.

A motion to dismiss for want of jurisdiction was made and withdrawn and a motion for a re-hearing and new trial and one in arrest of judgment were made, heard and overruled by the Court below, and judgment rendered for the defendant in error. (R. 23-24-25.)

Six bills of exception were filed in the cause. (Record, 25, 26, 27, 28.)

The assignments of error are on p. 28 and 29 of Record.

Argument.

Every intendment will be made by this Court in support of the proceedings in the Court below.

The presumption is in favor of the regularity of its proceedings—and I shall endeavor to show to your Honors that there were no errors in the proceedings in the Court below. If there were any they were such they did not prejudice the rights of the plaintiff in error who brings this cause here for a reversal of the judgment rendered against him.

The first proposition I make is that THERE IS NO ALLEGATION OF FRAUD, DURESS OR MISTAKE ALLEGED OR PLEAD BY EMBREY:

Bill of Exceptions No. 1.

The first error assigned (R. 28), is as follows:

In sustaining the demurrer of the plaintiff to the defendants amended plea of wager, as set forth in the defendant's first bill of exceptions (R. 25).

The Court below did not err in sustaining the demurrer to the defendant's amended plea of wager—for the following reasons:

1st. The defendant wishes to establish orally that another contract was made, not in writing and which he alleges was illegal, in order to make out the illegality of his promissory notes. This cannot be done. No doubt all contracts which are illegal may be attacked, but no case has been shown which authorizes a party to prove verbally, that another contract (in itself illegal) existed and to get rid of a written contract on its face unexceptionable.

Porter *v.* Viets, 1 Biss., 179 and 180.

In Burnes *v.* Scott, 117 U. S., p. 585., this Court say

a party cannot by an alleged contemporaneous verbal agreement vary or contradict the contract which the parties had reduced to writing. It was offered to show that a promissory note in the usual form was not intended to be a promissory note by which the maker promised nothing, which gave no rights to the party, and was to all intents and purposes vain, futile and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose.

" It is very easy for either party to swear to what his own understanding of a contract was; but that standing alone is manifestly immaterial. The secret intentions of one party contrary to what appears on the face of a contract, and not communicated to the other party cannot prevail to make a contract illegal which is otherwise valid.

If Embrey was suing the parties with whom he contracted, either to buy or sell cotton for the difference between the contract and the market price, the case would be different.

This, is the case to put it in the strongest light for the plaintiff in Error, of an agent who advances money to his principal to pay losses incurred in an illegal transaction, and takes his note for the money so advanced. In such a case, the contract between the principal and agent, made after the illegal transactions are closed; although it may spring from them and be the result of them, is a binding contract

Lehman *v.* Strasburger, 2 Woods C. C., 554, per Justice Woods.
Chapman *v.* Lemon, 4 Woods C. C., 656.
Durant *v.* Bart, 98 Mass., 167.
Petrie *v.* Hannay, 3 Term, 418.
Owen *v* Davis, 1 Bailey, 315.
Armstrong *v.* Toler, 11 Wheat., 274.
Warren *v.* Hewitt, 45 Ga., 501;
Clarke *v.* Foss, 7 Biss, 540.
Wolcott *v.* Heath, 78 Ill., 433;
Faikney *v.* Reynolds, 4 Burr, 2069.
Farmer *v.* Russell, 1 B. & P., 269.

Wyman *v.* Fiske, 85 Mass., 234;
Porter *v.* Viets, 1 Biss. 177.

2d.—There is no error in the action of the Court below striking out the plea of wager, for there is at the very threshold of this case a well settled principle of law which excludes it from consideration entirely. That principal of law is this: That when parties, having mutual matters of account between them growing out of a contract, deliberately come together and state a balance, and the party who on such accounting, is found indebted to the other, pays the debt *or gives a written obligation for its payment*, this settlement *is so far conclusive* between the parties that it cannot be re-opened or gone into either at law or equity except upon clear proof of fraud or mistake, or of an express understanding that certain matters were left open for settlement.

Knox *v.* Whalley, 1 Esp., 159.
Bull *v.* Harris, 31 Ill., 489.
Lee *v.* Reed, 4 Dana, 111.
Hodges *v.* Hosford, 17 Vt., 615.
Darlington *v.* Taylor, 3 Grant's Cas., 195.
Martin *v.* Beckwith, 4 Wis., 220.
Gibson *v.* Hanna, 12 Mo., 165.
Cogswell *v.* Whittlesey, 1 Root, 384.
Sergeant *v.* Ewing, 36 Pa. St., 156.
Nicholson *v.* Pelannie, 14 La. An., 508.

And when such an account is settled, the presumption is that all the previous dealings between the parties relating to the subject matter of the account are adjusted.

Gibson *v.* Hanna, 12 Mo., 165.
Bourke *v.* James, 4 Mich., 336.
Mills *v.* Geron, 22 Ala., 669.

These rules are founded in plain justice aud good sense. For the preventing of litigation the law favors and upholds the settlement of differences between the parties, and when men deliberately meet together and go over the entire

subject of a contract, makes what purports to be a final settlement of that contract, and pay or receive the money found due, *or give and receive a written obligation in lieu of the money*, the law considers that they mean something by so doing, and that what they mean is that every element entering into the contract, which might have been there settled, was settled, and that the settlement was intended as a finality. The law further considers that in the absence of fraud or mutual mistake, an attempt to re-open such a settlement and litigate antecedent matters which ought to have been and might have been embraced in it, is unjust, vexatious productive of fraud and perjury, and in every way contrary to sound policy.

Per Judge Thompson, in Pickel *v.* Ass., 10 Mo. Apps., 194 and 195.
Affirmed in Pickel *v.* Ass., 80 Mo.,
addition, Haysler *v.* Owen, 61 Mc
Johnson *v.* Lowe, 72 Mo., 637.

It is against public policy to permit a par
contract to contest his liabilities thereunder.

Bassett *v.* Shepardson, 52 Mich., 3.

3d. It is a well settled principle in the Federal Courts that a Party to a negotiable instrument is not a competent witness to prove any fact existing at the time of his accrediting the paper, tending to invalidate it.

Bank *v.* Dunn, 6 Peters, 51.
Bank *v.* Jones, 8 Peters, 12.
Scott *v.* Lloyd, 12 Peters, 145.
Henderson *v.* Anderson, 3 How., 73.
Smyth *v.* Strader, 4 How., 404.
Saltmarsh *v.* Tuthill, 13 How., 229.
Sweeney *v.* Easter, 1 Wall, 166.
Davis *v.* Brown, 94 U. S., 423.

4th. It has also been settled in this Court that a continued recognition of a debtor's liability and his agreement to dis-

Wyman *v.* Fiske, 85 Mass., 234;
Porter *v.* Viets, 1 Biss. 177.

2d.—There is no error in the action of the Court below striking out the plea of wager, for there is at the very threshold of this case a well settled principle of law which excludes it from consideration entirely. That principal of law is this: That when parties, having mutual matters of account between them growing out of a contract, deliberately come together and state a balance, and the party who on such accounting, is found indebted to the other, pays the debt *or gives a written obligation for its payment*, this settlement *is so far conclusive* between the parties that it cannot be re-opened or gone into either at law or equity except upon clear proof of fraud or mistake, or of an express understanding that certain matters were left open for settlement.

Knox *v.* Whalley, 1 Esp., 159.
Bull *v.* Harris, 31 Ill., 489.
Lee *v.* Reed, 4 Dana, 111.
Hodges *v.* Hosford, 17 Vt., 615.
Darlington *v.* Taylor, 3 Grant's Cas., 195.
Martin *v.* Beckwith, 4 Wis., 220.
Gibson *v.* Hanna, 12 Mo., 165.
Cogswell *v.* Whittlesey, 1 Root, 384.
Sergeant *v.* Ewing, 36 Pa. St., 156.
Nicholson *v.* Pelannie, 14 La. An., 508.

And when such an account is settled, the presumption is that all the previous dealings between the parties relating to the subject matter of the account are adjusted.

Gibson *v.* Hanna, 12 Mo., 165.
Bourke *v.* James, 4 Mich., 336.
Mills *v.* Geron, 22 Ala., 669.

These rules are founded in plain justice aud good sense. For the preventing of litigation the law favors and upholds the settlement of differences between the parties, and when men deliberately meet together and go over the entire

subject of a contract, makes what purports to be a final settlement of that contract, and pay or receive the money found due, *or give and receive a written obligation in lieu of the money*, the law considers that they mean something by so doing, and that what they mean is that every element entering into the contract, which might have been there settled, was settled, and that the settlement was intended as a finality. The law further considers that in the absence of fraud or mutual mistake, an attempt to re-open such a settlement and litigate antecedent matters which ought to have been and might have been embraced in it, is unjust, vexatious productive of fraud and perjury, and in every way contrary to sound policy.

Per Judge Thompson, in Pickel *v.* Ass., 10 Mo. Apps., 194 and 195.
Affirmed in Pickel *v.* Ass., 80 Mo., 65; citing in addition, Haysler *v.* Owen, 61 Mo., 270.
Johnson *v.* Lowe, 72 Mo., 637.

Harper v Thompson 1 Black 80.

It is against public policy to permit a party to a written contract to contest his liabilities thereunder.

Bassett *v.* Shepardson, 52 Mich., 3.

3d. It is a well settled principle in the Federal Courts that a Party to a negotiable instrument is not a competent witness to prove any fact existing at the time of his accrediting the paper, tending to invalidate it.

Bank *v.* Dunn, 6 Peters, 51.
Bank *v.* Jones, 8 Peters, 12.
Scott *v.* Lloyd, 12 Peters, 145.
Henderson *v.* Anderson, 3 How., 73.
Smyth *v.* Strader, 4 How., 404.
Saltmarsh *v.* Tuthill, 13 How., 229.
Sweeney *v.* Easter, 1 Wall, 166.
Davis *v.* Brown, 94 U. S., 423.

4th. It has also been settled in this Court that a continued recognition of a debtor's liability and his agreement to dis-

charge it, after he has full knowledge of all the facts in relation to the matter estops himself from pleading a want of consideration or setting up fraud as a defence to an action on the promise.

Fitzpatrick *v.* Flanigan, 106 U. S., 648.
S. P. McCrary *v.* Parsons, 31 Kas., 447.
Stebbins *v.* Crawford Co., 92 Pa. St., 289.
Davis *v.* Gray, 17 Ohio St., 330.
Negley *v.* Lindsay, 67 Pa. St., 217.

A negotiable note or bill of exchange is an extinguishment of a simple contract debt, the maker being liable to pay the money to a third person.

2 Bac. Abr., Debt, G, 290.
Bac. Ab. VI., p. 281, note.
Kearslake *v.* Morgan, 5 D. & E., 513.

A negotiable bill or note imports a consideration and neither the payee nor holder is required to prove any.

Mandville *v.* Welch, 5 Wheat., 277.
Powell *v.* Graves, 14 La. Ann., 860.
Coburn *v.* Odell, 30 N. H., 540.
Bank *v.* Chambers, 11 Rich L., 657.
Murray *v.* Claborn, 2 Bibb, 300.
Middlebury *v.* Case, 6 Vt., 165.
Camp *v.* Tompkins, 9 Conn., 545.
Schoonmaker *v.* Roosa, 17 Johns., 301.
Feagon *v.* Cureton, 19 Ga., 404.
Stacker *v.* Hewitt, 2 Ill., 207.

If Embrey had paid the money instead of giving his notes, could he have recovered it back? Then having given his notes is payment by anticipation. Embrey was not bound in law to give his notes, but since he choose to give his notes, there is good consideration for its payment. If Embrey had paid the losses to the parties Moody and Jemison did it is clear he could not have recovered it. It is in effect the same with a note. There is money paid on Embrey's account, and that is ample consideration for the bill.

Oulds *v.* Harrison, per Parke, B., 10 Exchq., 577.

The notes, as between the original parties, are evidence of money lent.

Clark *v.* Martin, Ld. Raym., 755.
Grant *v.* Vaughan, 3 Burr, 1525, per Lord Mansfield.
Morgan *v.* Jones, 1 C. & J., 167.
Smith *v.* Kendall, 6 T. R., 123.
Byles on Bills [424].

and of an account stated when they fall due.

Wheatley *v.* Williams, 1 M. & W., 539.
Irving *v.* Veitch, 3 M. & W., 90.
Byles on Bills [424].

The endorsement by Moody and Jemison is *prima facie* evidence of money lent by the indorsee to the indorsers and

Kessebower *v.* Tims, Bagley, 6 Ed., 357-359,

of an account stated.

Burmester *v.* Hogarth, 11 M. & W., 101.
Fryer *v.* Roe, 12 C. B., 437.

The original debt is confessed good by the accounting.

Brinsley *v.* Partridge, Hob., 88.

The stating of an account is in the nature of a new promise.

Holmes *v.* D'Camp, 1 Johns., 34.

Embrey, in his special and amended plea of wager (Record, p.17), and in his testimony (Record, p.27), proves that a demand existed between him and Moody and Jemison respecting which the account was stated.

Lubbock *v.* Tribe, 3 M. & W., 607.
Tucker *v.* Barrow, 7 B. & C., 623.
Whitehead *v.* Howard, 5 Moore, 105.
Green *v.* Daires, 14 B. & C., 235.

That a balance was then struck and agreed upon.

Trueman *v.* Hurst, 1 T. R., 42.
Prouting *v.* Hammond, 8 Taunt., 688.

And he expressly (by the execution of his four promissory notes), admitted that the amount specified in said four promissory notes was then due from him as a debt.

Ashby *v.* Ashby, 3 M. & P., 186.

The accounting took place long prior to the commencement of this action.

Spencer *v.* Parry, 3 A. & E., 331.
Allen *v.* Cook, 2 Dowl., 546.

The promissory notes are evidence of an account stated.

Burmeister *v.* Hogarth, 11 M. & W., 97.
Fesenmayer *v.* Adcock, 16 M. & W., 449.
Curtis *v.* Rickards, 1 Scott N. R., 155.
Chitty Contracts, 8th Ed., pp. 562, 567.
Hughes *v.* Thorpe, 5 M. & W., 656.
Bernanacioni *v.* Anderson, Moo. & M., 183.
Gould *v.* Coombes, 1 C. B., 543.
Payne *v.* Jenkins, 4 C. & P., 324.
Brick *v.* Hurst, L. R. 1 C. P., 297.

And after giving the promissory notes set forth in the declaration Embrey can not go into evidence to impeach the charges in the first account, which has been settled.

Knox *v.* Whalley, 1 Esp., 159.
Dawson *v.* Remnant, 6 Esp., 24.
Laycock *v.* Pickles, 4 B. & S., 506.
Milward *v.* Ingram, 2 Mod., 44.

Everthing disaffirming a contract and showing it to be void may be given in evidence under the plea of *nil debet* or the general issue.

Craig *v.* Missouri, 4 Peters, 410.
Mason *v.* Eldred, 6 Wall, 231.
County *v.* Clews, 21 Wall., 317.

Where *nil debet* is pleaded it is not error to strike out notice of special matter to be given in evidence, where the same is admissible under that plea.

U. S. *v.* Stone, 106 U. S., 525.

Issue being joined on the plea of *nil debet* the defence of wager was made, see testimony of Embry. Record, Bill of Exceptions (5) page 27, The judgment will not be disturbed after verdict.

The only statute in Virginia as to wagers, enacted in 1849, is the following, "Gaming contracts void":

See Page

Every contract, conveyance or assurance, of which the consideration, or any part thereof, is money, property or other thing won, or bet, at any game, sport, pastime or wager, or money lent or advanced at the time of any gaming, betting or wagering, to be used in being so bet or wagered (when the person lending or advancing it knows that it is to be so used), shall be void."

This statute is a penal statute, and must be strictly construed. It must be limited in its application to the object the Legislature had in view, and can not be extended to matters that did not exist when the statute was made. Penal statutes can not be enlarged by intendment, and acts not expressly forbidden by them cannot be reached merely because they resemble the offenses provided against, or are equally, or in the same way demoralizing or injurious. They cannot be made to embrace any thing which was not within the intent of the Legislature.

(A similar case.) Shaw *v.* Clark, 49 Mich., 384.
U. S. *v.* Clayton, 2 Dill., 225.
Griffith *v.* Sears, 112 Pa. St., 523.
U. S. *v.* Morris, 14 Pet., 464.
McCormick *v.* Nichols, 19 Ill. App., 334.
U. S. *v.* Wiltberger, 5 Wheat., 76.

Reed *v.* Davis, 8 Pick, 515.
U. S. *v.* Sheldon, 2 Wheat, 119.
Sprague *v.* Birdsall, 2 Cowen, 419.
Ferret *v.* Atwill, 1 Blatchf., 151.
Jenkinson *v.* Thomas, 4 T. R., 666.
Fletcher *v.* Lord Sondes, 3 Bing, 580.
Rex v. Handy, 6 T. R., 288.
Rex *v.* Hymon, 7 T. R., 536.
Walwin *v.* Smith, 1 Salk., 177.
U. S. *v.* Ragsdale, Hemp., 497.
Dwarris on Stat., 642.
Sedgwick, Const. Law, 324, 326-334, 391, 392.

Though an illegal contract will not be enforced by Courts, yet it is the doctrine of this Court that where such a contract has been executed by the parties themselves, and the illegal object been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise express or implied, and that the Court will not unravel the transaction to discover its origin.

Bank *v.* Bank, 16 Wall., 483.
Brooks *v.* Martin, 2 Wall., 70.
Cook *v.* Sherman, 20 Fed. R., 167.

The transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the Court is asked to do between the parties.

Sharp *v.* Taylor, 2 Ph. Ch. R. 801.
McBlair *v.* Gibbes, 17 How., 232.
Brooks *v.* Martin, 2 Wall., 80 and 81.

The promise of Embry as evidenced by his notes was a new contract, not affected by the illegality of the original transaction.

Tenant *v.* Elliott, 1 B. & P., 3.
Farmer *v.* Russell, 1 B. & P., 296.
Faikney *v.* Renolds, 4 Burr., 20, 69.
Petrie *v.* Hannay, 3 T. R., 418.

Thompson *v.* Thompson, 7 Vesey, 473.
Approved in Armstrong *v.* Toler, 11 Wheat., 258.
McBlair *v.* Gibbes, 17 How., 232.
Brooks *v.* Martin, 2 Wall., 70.
Bank *v.* Bank, 16 Wall., 483.
Cook *v.* Sherman, 20 Fed. R., 167.

In Kimbro *v.* Bullitt, 22 How., 269, this Court say : "It is not perceived how their right to recover the amount can be affected by the fact that one of the drawers applied the money to an unlawful purpose." But the illegal act, if any in this case, was performed by Embry and not by Jemison. Suppose Embry had borrowed the money from Jemison personally and given his notes therefor, it surely could defeat the right of the lender to recover on the contract.

Regarding this point as too clear to be the subject of dispute, we forbear to pursue the discussion.

Kimbro *v.* Bullitt, 22 How., 269.

It has been decided by this Court that, "where several persons enter into an illegal contract for their own benefit, and the illegal contract has been consummated, and the proceeds of the enterprise have been actually received and carried to the credit of one such parties, so that he can maintain an action therefor without requiring the aid of the illegal transaction to establish his case, he may be entitled to relief."

Brooks *v.* Martin, 2 Wall., 70.
Planters' Bank *v.* Union Bank, 16 Wall., 483.

The rule upon this subject is accurately stated in the last named case, as follows: "But when the illegal transaction has been consummated : when no Court has been called upon to give aid to it ; when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value ; and when they have been carried to the credit of the plaintiff, the case is different. The Court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction

to establish their case: It is enough that the defendants have in hand a thing of value that belongs to them."

According to this rule, the question in such cases must always be, can the plaintiff maintain his action without enforcing the illegal contract or, in other words, has he a cause of action independent of the illegal contract. If it appears that the defendants in a given case have received money or property from the complainants, and which belongs to the latter, the same may be recovered without any inquiry into the nature of the contract under which such money or property was acquired. The distinction is between enforcing an illegal contract and asserting title to money and property which has arisen from it.

Applying this rule, THE DEMURRER TO THE PLEA OF WAGER WAS PROPERLY SUSTAINED.

Oulds *v.* Harrison, 10 Exch., 572.
Jessop *v.* Lutwyche, 10 Exch., 614.
Knight *v.* Cambers, 15 C. B., 562.
Rosewarne *v.* Billing, 15 C. B. N. S., 316.
Pidgeon *v.* Burslem, 3 Exch., 465.
Alcinbrook *v.* Hall, 2 Wilson, 309.
Smith *v.* Lindo, 5 C. B. N. S., 587.

Irwin *v.* Williar, 110 U. S., 499, and cases there cited are not applicable to this case, for the following reasons: In that case an action was brought to recover a balance due on a contract for the purchase and sale of grain. There is no such issue in this case. This is an action to recover on four promissory notes, on an account stated and agreed to by the plaintiff in error, and is brought against him by a *bona fide holder* of the four notes described in the declaration. The notes import value received and engagement to pay the amounts on certain specified terms.

Byles on Bills, p. 195 [* 96] 5th Am. Ed.

Courts of error do not sit to decide moot questions, but to redress real grievances. Therefore, no judgment will be reversed if the case was fairly presented to the jury and especially if their verdict was obviously correct. A good verdict cures all errors in the intermediate steps by which it was reached. If this Court sees that justice has been done between the parties, it will not set aside the verdict nor enter into a discussion of the questions of law. Where the Court can see from the whole record that substantial justice has been done, and that another trial will produce the same result, or will inevitably produce the same result, it will not disturb the verdict.

The record, page 24, shows that the jury having heard the evidence given by Embry and the arguments of his counsel, found for the plaintiff.

The very facts which Embry attempted to set up in his special plea of wager and which pleas were rightfully stricken out by the Court below, were given in evidence to the jury and while the evidence given by Embry was his version of the matter he had all the benefit he could have obtained had his plea of wager been sustained. The jury after hearing his testimony (record p. 27) found against him. If there is any error it is against the respondent allowing such evidence to go to a jury in a case of this kind—upon the authorities hereinbefore cited.

See Appendix, pp. 32, 33, 34.

Bill of Exceptions Nos. 2 and 4,

relating to the Plea of the Statute of Limitations. This bill shows (R. 25) that the plaintiff in error filed his plea of the Statute of Limitations (see Plea Record, 13). To this plea the defendant in error filed a special replication (Record 15), to which plaintiff in error filed his rejoinder (Record, pages 15 and 16). The defendant in error moved to reject this rejoinder, and the bill of exceptions (R. 25) shows that after full argument on the pleas, the Court below, in accordance with the decision in the case of Ficklin *v.* Carrington, 31 Grattan, and § 20, ch. 146, of the

Code of Virginia, 1873, page 1002, rejected said rejoinder. The opinion of the Court is on pages 16 and 17 Record. Section 20, page 1002 of the Code of Virginia, 1873, is as follows:

"Saving to plaintiff, where suing was prevented by defendant.

"Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means, obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. But this section shall not avail against any other person than him so obstructed, notwithstanding another might have been jointly sued with him if there had been no such obstruction. And upon a contract which was made and was to be performed in another State or country by a person who then resided therein, no action shall be maintained after the right of action thereon is barred by the laws of such State or country."

The construction given by the courts of a State to a Statute of that State is received as true; and enforced in all Federal Courts unless it conflicts with the Constitution or Laws of the U. S.

Leffingwell *v.* Warren, 2 Black, 599.

State Statutes of Limitation, no rule being given by Congress, from the rule of decision in United States Courts and the like effect there given as in the State Courts.

McCluny *v.* Silliman, 3 Pet., 270.
Ross *v.* Duval, 13 Pet., 45.
Harpending *v.* Church, 16 Peters, 455.
Moores *v.* Bank, 104 U. S., 625.
Henderson *v.* Guffin, 5 Pet., 151.
Leffingwell *v.* Warren, 2 Black, 599.
Goldenberg *v.* Murphy, 108 U. S., 162.

The State Statute of Limitations govern in common law cases in the Federal Courts unless Congress has provided otherwise.

U. S. Rev. Stats., § 721.

In Ficklin *v.* Carrington, 31 Gratt., p. 224 to 227. The Court of Appeals of Virginia passed on precisely the same plea of the Statute of Limitations as set up by the plaintiff in error in this case, and the opinion in that case delivered by Christian, Judge, is decisive in this case.

The following extract is the construction by the highest Court in the State of Virginia on the plea of limitations, and is from the opinion of Christian, J., in the case of Ficklin against Carrington, on which the Court below rejected Embry's plea of limitations, commencing on page 224 of the 31st Grattan:

"The replication by the plaintiff to the plea of the statute of limitations intended manifestly, to affirm that the mere removal of the defendant beyond the limits of the State was an obstruction in itself to the prosecution of the plaintiff's suit, and that in such case the statute of limitations would cease to be a bar to the plaintiff's action.

"The rejoinder to this replication, which was permitted to be filed by the Court, affirmed the proposition that the mere removal of the defendant beyond the limits of the State did not of itself obstruct the prosecution of the plaintiff's suit; but it was necessary to show, on the part of the plaintiff, that he was in fact obstructed in consequence of such removal; so that, under these pleadings, the question we have to determine is, whether the removal of a defendant who has been a resident of the State beyond the limits of the State is sufficient of itself, under the statute, to be relied on as an obstruction to the prosecution of the plaintiff's suit, or whether it is necessary for the plaintiff to show that he was in fact obstructed by or in consequence of such removal."

The solution of this question depends upon the true construction to be given to the statute law on this subject.

The first act on this subject is found in 1 Rev. Code, 1819, p. 491, §14. It provides that, "If any defendant shall abscond or conceal himself, or by removal out of the country or the county where he resides when the cause of action accrued, or by any other indirect ways or means defeat or obstruct the plaintiff, then the defendant shall not be admitted to plead the statute of limitations."

This statute, based upon the English Statute of 4 Anne (see 3 Hen. Stats. at Large, 383-4), which provided that if at the time the cause of action accrued, the person liable to it was beyond seas, the plaintiff might bring his action within the usual period of limitations after his return.

The next act on the subject was in 1826, and was as follows: "If any defendant in any of the aforesaid actions shall abscond or conceal himself, or remove from this commonwealth, or by any other indirect ways or means defeat or obstruct any person," &c., &c.,

Under the revisal of 1849 the following section, which changes the phraseology and the structure of the sentences contained in the former act without changing their meaning, is as follows:

"Where any such right as is mentioned in this chapter shall accrue against a person who had before resided in this State, if such person shall, by departing without the same, or by absconding or concealing himself, or by any other indirect ways or means obstruct the prosecution of such right, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted."

"We think it is plain that the change here made, which is simply placing the preposition "by" before the word removing or "departing" from the state does not alter the meaning of the statute. It means the same thing to declare that "if he remove" from the State, or by other indirect means he obstruct the prosecution of the suit, as to say "if, by removal or departing from the State, or other indirect means, he obstruct" the prosecution of the

suit, etc. The use of either phrase means in effect the same thing.

Rep. of Rev., 746 and note.
Wilkinson & Co. *v.* Holloway, 7 Leigh., 277.
Markle's Adm'r. *v.* Burch's Adm'r, 11 Gratt., 26.

" We think it is plain, looking to all the statutes above referred to, and noticing the modification in the structure of the sections without changing its meaning, that it was the purpose of the legislature to declare that where a party having been a resident of this State has gone beyond its limits, that such departing from the State, should be of itself, be considered, during the period of such absence, an obstruction of the plaintiff's right to proscute his suit, and should not be counted in the period of the Statute of Limitations.

" The Court is, therefore, of opinion that upon the plea of the Statute of Limitations, as well as the plea of *non assumpsit*, the judgment ought to have been for the plaintiff below."

And this is the construction placed upon similar statutes in other states and by this Court. It applies when the party is without the limits of jurisdiction of the state where the action is brought.

Murray *v.* Baker, 3 Wheat, 341.
Bank *v.* Dyer, 14 Peters. 141.
Brent *v.* Tasker, 1 H. & McH., 89.
Pancoast *v.* Addison, 1 H. & D., 350.
Forbes *v.* Foot, 2 McCord, 331.
Denham *v.* Holeman, 26 Ga., 182.
White *v.* Bailey, 3 Mass., 271.
Byrne *v.* Crowninshield, 1 Pick., 263.
Galusha *v.* Cobliegh, 13 N. H., 79.

The plaintiff in error filed a similar plea (Record p. 15), which is in almost the identical words as this. The rejoinder was rejected (See Record P. 15), and the decision of the Court thereon became *res judicata*. No exception was taken to this ruling of the Court, and having

been once adjudicated (see Record p. 15), that part of the case was finally settled.

All motions affecting the substantial rights of parties are appealable, and, therefore, final, unless reversed or modified by an appellate tribunal, and are placed upon the same basis as any final judgment. Whenever a motion admits of "grave discussion and deliberation, and are made part of the record in a cause and subject to review in another court," the decision by a court upon such motion is generally regarded as a final judgment or adjudication, and the the rule of *res judicata* applies.

Dwight *v.* St. John, 25 N. Y., 203.,
Grier *v.* Jones, 54 Ga., 154.
Pierce *v.* Kneeland, 9 Wis., 23.
Corwith *v.* Bank, 11 Wis., 430.
Langdon *v.* Raiford, 20 Ala., 532.
Gavin *v.* Graydon, 41 Ind., 559.
Hoffman *v.* Livingston, 1 Johns. Ch., 211.
People *v.* Center, 61 Cal., 191.
Spitley *v.* Frost, 15 F. R., 299.
Gregory *v.* Haynes, 21 Cal., 443.
Hill *v.* Hoover, 9 Wis., 15.
Sanderson *v.* Daily, 83 N. C., 67.
Rogers *v.* Hoenig, 46 Wis., 361.
Bank *v.* Upham, 14 Wis., 596.
Cothren *v.* Connaughton, 24 Wis., 134.
Kabe *v.* Eagle, 25 Wis., 108.
McCullough *v.* Clark., 41 Cal., 298.
Davis *v.* Cottle, 3 T. R., 405.
Mitchell *v.* Allen, 12 Wend., 290.
Dodd *v.* Astor, 2 Barb. Ch., 395.
Greathead *v.* Bromley, 7 T. R., 455.
Benjamin *v.* Wilson, 6 L. C. Jur., 246.
Smith *v* Coe, 1 Swee, 385.
Noble. *v.* Cope, 50 Pa. St., 17.

Commissioners *v.* McIntosh, 30 Kans., 234.
Austin *v.* Walker, 61 Iowa., 158.
Sanderson *v.* Murray, 83 N. C., 67.
Murrill *v.* Murrill, 84 N. C., 182.
Trauenthal's Appeal, 100 Pa. St., 230.

If we should be in error in regard to this matter being *res judicata*, then we claim that the plaintiff in error, Embrey, pleads the very fact which, under the Law of the State of Virginia and the decision in Ficklin, Exr., *v.* Carrington, 31 Gratt., 219, above quoted, takes the case as to him out of the Statute of Limitations, and there was no error in rejecting his first plea and rejoinder and no error in refusing to allow him to file the same plea of Limitations after it had *been once adjudicated* by the Court below. The plaintiff in error not having obtained leave at the time his plea of the Statute of Limitations was rejected, to file another plea of Limitations it was a matter that was purely discretionary with the court below as to permitting him to file a second plea of the same kind. Matters in the discretion of the court below are not appealable.

Leave to file a plea of the Statute of Limitations applied for out of time will be refused.

Loving *v.* Fairchild, 1 McLean, 333.

New pleas should be allowed only where a good reason is shown for it.

Childs *v.* Lenig, 1 Wall. Jr., 305.

The appellant, Embry, though he may have been a citizen of Louisiana, was found and served in the Eastern District of Virginia, and that gave the U. S. Circuit Court for that district jurisdiction of the case, the requisite amount involved being sufficient. The jurisdiction being dependent on citizenship as long as Embry was not a resident of New York, the same State as the plaintiff below, or his assignors, but of another State, it matters not what State he is a citizen of so that he was served or found in the

district where suit is brought. If he was not a citizen of Virginia the statute of that state is of no benefit to him. That a non-resident cannot avail himself of the benefit of the statutes of another state than the one he is a citizen of has been frequently decided—Had Embrey returned to New York the place of the contract, instead of Virginia where he was found he could not have plead the act of limitations as a bar, his absence from the state would have defeated such a plea.

Jones *v.* Andrews, 10 Wall., 327.
McMicken *v.* Webb, 11 Pet., 25.
Ober *v.* Gallagher, 93 U. S., 199.
Toland *v.* Sprague, 12 Pet., 300.
Boswell *v.* Otis, 9 How., 336.
Levy *v.* Fitzpatrick, 15 Peters, 157.
Kendall *v.* U. S., 12 Pet., 524.
Harris *v.* Hardeman, 14 How., 334.

Bill of Exceptions No. 3

relate to an order made for the production of all the books, records, &c., of the firm of Moody and Jemison showing all their business transactions from the organization to the dissolution of said firm—the list of books called for is on pages 22-23 of Record.

Section 724 Revised Statutes of the United States provides: On the trial of actions at law the Court may, on motion and due notice thereof, require the parties to produce books and writings in their possession or power which contains evidence *pertinent* to the issue in cases and under circumstances where they might he compelled to produce the same by the ordinary rules of proceeding in chancery. The Court below vacated the order on the grounds stated in this bill of exceptions. The matter is one in the discretion of the Court.

Bank *v.* Bank, 3 Cliff., 201.

The Court must be satisfied that the documents

contain *Evidence Pertinent* to the issue. This is a matter that is purely discretionary with the Court, from which no appeal lies to this Court. A writ of error will not lie to an order setting aside a writ previously granted.

Smith *v.* Trabue, 9 Peters, 4.
Gregg *v.* Forsyth, 2 Wall. 56.
Barton *v.* Forsyth, 5 Wall. 190.

If the position we take in regard to the plea of wager is correct these documents could not contain any evidence pertinent to the issue. There was no issue which necessitated any such evidence. If we are wrong in this position then we claim that the application was insufficient.

The applicant must show that the books exist, are in control of the other party; that they are pertinent to the issue, and that the case is such that a Court of Equity would compel its discovery.

Iasigi *v.* Brown, 1 Curt. C. C., 401.

A *prima facie* case of of the existence of the books and their materiality must be made out, before the Court will pas an order *nisi*.

Iasigi *v.* Brown, 1. Curtis C. C., 401.

The application must *point to the places* where the information sought for exists, *or describe the entries*, other than by merely stating their supposed effect as evidence. It must also show the *expediency or necessity* for resorting to this mode of proof. If it is deficient in these particulars the inspection will be denied.

Iron Co. *v.* Loan Co., 55 How. Pr., 351.

It must *state definitely* what it is the petitioner seeks to discover, so that the Court may see that it is material to the case.

People *v.* Rector, 6 Abb. Pr., 9.
Walker *v.* Bank, 19 Abb. Pr., 111.

It must show the entries affecting or throwing some light on the matters in controversy, exist, or at least enough to call on the adverse party to show whether they do or do not exist. It must show that such entries are *material*, and it must *state facts* from which the Court can see that they are material, in addition to stating other matters prescribed by the Court rules regulating such application.

Cassard *v.* Hinman, 6 Duer., 695.

The entries, of which a discovery is sought must be described with sufficient certainty, to enable the adverse party to ascertain whether they exist and are in his possession.

People *v.* Rector, 6 Abb. Pr., 9.

So an application will not be granted, where it prays for a discovery generally, of all the books, papers and correspondence of the adverse party, containing entries made during a period of several years, relating to purchases of a specified commodity.

Cassard *v.* Hinman, 6 Duer., 695.

The application and order were too vague and do not show that Jemison had the *books or that they were pertinent to the issue.*

Practical certainty is required in the description of the books and papers which are to be produced, as in the case of a subpœna *duces tecum.*

Olney *v.* Hatcliff, 37 Hun, 286.

In every case the party claiming must give evidence of the relevancy of the documents and of the opposite party having possession of them.

Bass *v.* Steele, 3 Wash. C. C., 381.
Triplett *v.* Bank, 3 Cranch C. C., 646.
Jacques *v.* Collins, 21 Blatchf., 23.
Iasigi *v.* Brown, 1 Curt., 401.

To the party required to produce the books or writings notice must be given.

May *v.* Carberry, 2 Cranch, 336.
Thompson *v.* Selden, 20 How., 195.
Bass *v.* Steele, 3 Wash. C. C., 381.

And it must contain information that a motion will be made for a non-suit, or for judgment by default.

Bas *v.* Steele, 3 Wash. C. C., 381.

In Cassard *v.* Hinman, page 695, in 6 Duer, the Court say:

"It is impossible for the Court to perceive from any thing stated in the petition, in what respect the discovery asked for can be material to the defence in this action. It proposes a roving investigation into all the books, papers and correspondence of the plaintiff during a period of some eight or nine months, relating to, or in which are contained entries in respect to pork contracts entered into by him during that period, not with the defendant, but with all or any persons whatever; and it is not even intimated that such discovery, if allowed, would disclose a single gaming or illegal contract. It asks also for the correspondence between the plaintiff and Nathan, the mutual agent of the plaintiff and defendant in effecting the contracts in controversory in these suits, without giving the dates of the letters, or suggesting a single fact, which the defendant is informed or believes such correspondence will disclose.

"There is nothing asked for by way of discovery in this petition, which cannot, if competent to be proved at all, be as well proved by the examination of the plaintiff himself, or of Nathan, or other witnesses.

"The allegation that these books, papers, documents, and letters 'relate to the merits of the actions' is wholly insufficient. The petition must show in what respect they relate to the merits, that the Court may judge on that subject for itself.

"There is no adjudged case upon which this motion can

be sustained, and none that I have met with in which such a sweeping, roving search has been asked for at the hands of the court.

Stalker *v.* Gaunt, 12 Leg. Obs., 132.
Davis *v.* Dunham, 13 Pr. R., 425.
Com. Bk. Alb. *v.* Dunham, id. 541.
Hoyt *v.* Am. Exch. Bk., 1 Duer, 652."

This order was one in the discretion of the Court. It was to be satisfied of the pertinency of the evidence, the Court was to be satisfied that the books were in Jemison's possession. Could any matter be more discretionary than an order of this kind? The Court finds that said order "was improvidently issued, that the books called for were not in the plaintiff's possession, that the matter sought to be proved *was not pertinent to the issue*," This being one of the discretionary powers of the Court below, error is not assignable therefor, and this Court will not disturb the ruling of the trial court on matters that are discretionary.

Hall *v.* Weare, 92 U. S., 728.
Wright *v.* Hollingsworth, 1 Pet., 165.
Chuac *v.* Reniecker, 11 Wheat., 280.
U. S. *v.* Buford, 3 Peters, 12.
Sims *v.* Handly, 6 How., 1.
Parsons *v.* Bedford, 3 Peters, 433.
Mandeville *v.* Wilson, 5 Cranch, 15.
Breedlove *v.* Nicolet, 7 Peters, 413.
Welch *v.* Mandeville, 7 Cranch, 152.
U. S. *v.* Evans, 5 Cranch, 280.

5 Bill of Exceptions.

This relates to an instruction asked for by plaintiff in error and which the Court below correctly refused to give. If our position in regard to the plea of wager is sustained by this Court. The authorities cited herein to the first Bill of Exceptions apply to this instruction with equal force,

and there was no error in refusing this instruction. The presumption is that the Court below correctly charged the jury. This Court cannot say from the inspection of the record whether the charge of the Court in general terms covered this matter or not. The presumption is in favor of the Court charging the jury correctly on the law and the evidence. The jury had Embry's testimony before them. They found a general verdict against him. The error, if any, consisted in allowing Embry to give such testimony as this bill of exceptions shows was permitted to go to the jury. The only issue to be tried was whether Embry owed Jemison the amount claimed in the declaration and the jury found that he did.

The demurrer to Embry's special plea of wager having been sustained by the Court below, left but one issue in the case, that of *Nil Debet*, as Embry in his special plea of wager, (Record p. 17,) and in his evidence, (Record page 27,) stated that he voluntarily executed the four promissory notes sued on, in settlement of and to adjust the losses sustained by Moody and Jemison in the business transacted by them for him. he admitted the cause of action against him and there was no real issue to try. He did not plead fraud, mistake, or deny the execution of the notes as alleged in the declaration, nor did he claim to have paid them—there was then under the principles established by the cases cited to the first Bill of Exceptions in this brief, nothing upon which to base any such instruction. The testimony given by Embry was clearly irrevelant and inadmissible and while it went to the jury for what it was worth and was argued to the jury by his counsel, the verdict of the jury settled all questions relating to the contract and there was no error in refusing the charge which is made the subject of this bill of exceptions—there being no such issue in the case.

It does not appear that the Court below, in its own language, did not charge the jury in regard to the matters testified to by Embry. The Court was not bound to charge the

jury in the exact language used by Embry's counsel. The presumption is that the charge to the jury covered all the facts in the case, and until it is shown that Embry was injured by the charge given to the jury, we submit there is nothing in this exception to warrant the Court in disturbing the verdict.

Embrey's defence is that *he intended* to gamble in futures, and although the money was advanced, as shown by the notes, for his benefit, after the closing and settling up of his business with the firm and there was an account stated between them and there was a balance due them which he promised in writing to pay, yet his new promise was a lie; he did not intend to pay them; they "were mere memorandums which promised nothing, which gave no rights to the payee and were to all intents and purposes, vain, futile and of no force or effect whatever. It is not necessary to cite authority to show that the evidence was inadmissible for such a purpose." Opinion of this Court in Burns *v.* Scott, 117 U. S., 585–6.

The bill of exceptions does not purport to set out all the evidence, *only that introduced before the jury.* From the record it is apparent that other proceedings were had before the jury was sworn, and after the verdict and unless the evidence is set out, this Court will not reverse for instructions given or not given.

Wiggins *v.* Burnham, 10 Wall. 129.

6th Bill of Exceptions

relates to the refusal of the Court below to grant a new trial and overruling the motion in arrest of judgment.

This Bill of exceptions should not have been allowed by the Court below, it was taken after the verdict had been rendered.

Bills are restricted to matters of exception taking pending the trial, and ascertained before the verdict.

Walton *v.* U. S., 9 Wheat, 651.

Warfield v Chaffee 91 U.S. 690
Boom Co v Boom Co 110 U.S. 57
Black v Pennsylvania 128 U.S. 395

Brown *v.* Clark, 4 How., 415.
Turner *v.* Yates, 16 How., 29.

The verdict was rendered October 8th, and this bill of exceptions was not filed until Oct. 23, it is not properly before this Court.

Phelps *v.* Mayer, 15 How., 160.

To make an exception available it must appear that the ruling affected the decision.

R. R. Co. *v.* Smith, 21 Wall. 255.

There is no distinction between a motion for a new trial and one in arrest of judgment. The effect is the same, and cannot be reviewed on a writ of error.

R. R. Co. *v.* Hart, 114 U. S. 654.

The well settled rule of this Court is that no exception lies from a decision of the Court below granting or refusing a new trial, the motion is made to the sound discretion of the Court, and matters in the discretion of the Court below, such as amendments, matters of practice, &c., afford no ground for a bill of exceptions, nor is it assignable as error.

Mandeville *v.* Wilson, 5 Cranch, 15.
Ins. Co. *v.* Hodgson, 6 Cranch, 206.
Walden *v.* Craig, 9 Wheat., 576.
Wright *v.* Hollingsworth, 1 Pet., 165.
U. S. *v.* Buford, 3 Pet., 12.
Pickett *v.* Legerwood, 7 Pet. ch., 144.
Breedlove *v.* Nicolet, 7 Pet., 413.
Toland *v.* Sprague, 12 Pet., 300.
Matthewson *v.* Grant, 2 How., 262.
Sims *v.* Hundley, 6 How., 1.
Barrow *v.* Hill, 13 How., 54.
Day *v.* Woodworth, 13 How., 363.
Slicer *v.* Bank, 16 How., 571.
Doswell *v.* De La Lanza, 20 How., 29.
Thompson *v.* Seldon, 20 How., 195.
Spencer *v.* Lapsley, 20 How., 264.

Schuchardt *v.* Allen, 1 Wall., 359.
Freeborn *v.* Smith, 2 Wall., 160.
City *v.* Babcock, 3 Wall., 240.
Cheang Kee *v.* United States, 3 Wall., 320.
Deery *v.* Cray, 5 Wall., 795.
Sheets *v.* Seldon, 7 Wall., 416.
Avendano *v.* Gay, 8 Wall., 376.
Ins. Co. *v.* Weide, 9 Wall., 677.
The Quickstep, 9 Wall., 665.
Wiggins *v.* Burnham, 10 Wall., 129.
Cooke *v.* Burnley, 11 Wall., 672.
Henderson *v.* Moore, 5 Cranch, 11.
Ins. Co. *v.* Young, 5 Cranch, 187.
Hall *v.* Weare, 92 U. S., 728.
Railway Co. *v.* Heck, 102 U. S., 120.
Ins. Co. *v.* Barton, 13 Wall., 603.
Chirac *v.* Reinecker, 11 Wheat., 280.
Laber *v.* Cooper, 7 Wall., 565.
Kerr *v.* Clampitt, 95 U. S., 188.
Pomeroy *v.* Bank, 1 Wall., 592.
Blunt *v.* Smith, 7 Wheat., 248.
Barr *v.* Gratz, 4 Wheat., 213.
Sparrow *v.* Strong, 3 Wall., 97.
Brown *v.* Clark, 4 How., 4.
U. S. *v.* Hodge, 6 How., 279.
Warner *v.* Norton, 20 How., 448.
U. S. *v.* Evans, 5 Cranch, 280.
Welch *v.* Mandeville, 7 Cranch, 152.
Parsons *v.* Bedford, 3 Pet., 433.

A writ of error does not bring up irregularities previous to the trial. They are waived by a trial on the merits.

Evans *v.* Gee, 11 Pet., 80.

This Court will not hear on writ of error matters properly the subject of application for a new trial.

Freeborn *v.* Smith, 2 Wall., 160.

Error without prejudice affords no ground for reversal.

Where there is any evidence to prove the issue, question is for the jury.

Otis *v.* Watkins, 9 Cranch, 339.
Schuchardt *v.* Allens, 1 Wall, 359.

If there is evidence to support the judgment it will not be reversed because conflicting.

R. R. Co. *v.* Towboat Co., 23 How., 20.
Morewood *v.* Enequist, 23 How., 491.
The Potomac, 2 Black, 581.

Court will not examine evidence to ascertain whether jury was justified in finding as it has.

Gregg *v.* Morss, 14 Wall, 564.
Express Co. *v.* Ware, 20 Wall., 543.

There is no remedy in this Court for the mistake of a jury.

Willis *v.* Smith, 8 Wall., 27.
Woodruff *v.* Hough, 91 U. S., 596.

Right of the cause and matter in law is with plaintiff below. Judgment must be affirmed.

Stockton *v.* Bishop, 4 How., 155.

Upon the law and the facts this Court is asked to affirm the judgment of the Court below with damages and costs.

HENRY M. HERMAN,
Counsel for E. S. Jemison,
Respondent.

APPENDIX.

In Brown *v.* Speyers, 20 Grattan, 308, the Court of Appeals of Virginia, say :

"It is objected, however, that the contract, which is the foundation of this action, is a mere wager and void as such, under the provisions of the Virginia Statutes. I cannot perceive the force of this objection. By the very terms of the arrangement, the defendant in error, in buying and selling the gold, could sustain no loss, nor realize any profit from the transaction beyond his commission, to which he was entitled in any event. Whatever might happen, no damage or benefit could accrue to him from the adventure. If any profit resulted from the speculation, it belonged to the plaintiff in error. If any loss accrued, he was to bear it. And I have yet to see a case in which it has been held that a contract is a wager, by the terms of which the loss and profit were all on one side.

Another point relied upon in the argument is, that no sales and purchases of gold were in fact made; and the subject matter of such pretended purchases and sales had, at the time, no existence, actual or potential; and therefore, according to a well established principle of the law of sales, the contract in relation thereto was void in law. In support of this position several cases were cited, in which it has been held, that if goods are sold, to be delivered at a future day, and the vendor neither has the goods at the time, nor has entered into any prior contract to buy them, nor has any reasonable expectation of receiving them by consignment, but means to go into the market and buy the goods he has contracted to deliver, he cannot maintain an action on such contract. Whether this principle be sound or not, it is unnecessary now to decide.

It certainly has been repudiated by great judges, and is not regarded as law, according to the current of modern authorities. See 2 Parsons on Contracts, 543; Hibblewhite *v.* McMorine, 5 Exch. R., 462.

This principle, however, can only apply to actions by the vendor against the vendee to recover damages for non-performance of the contract. It can have no application to a case in which an agency is established, and the agent is authorized to go into the market, purchase the goods, and sell them for the benefit of his principal. In such case, if the agent conforms to his instructions, and a loss is sustained from the transaction, it would seem to be too clear for argument, that the principal is bound to indemnify the agent for any loss he may sustain. As the agent is not permitted to reap any of the profits of his agency he is entitled to be compensated for all expenditures and damage arising in the course of his employment."

In the same case the Court further says:

Independent of such considerations the Courts are very averse to holding contracts illegal upon grounds of public policy, unless the question is free from all doubt. In Hilton *v.* Eckersly, 6 Ellis and Black R., 47, the judges differed in opinion as to what public policy really was in the case then before them. Lord Campbell said he entered upon such considerations with much reluctance and great apprehension.

Bert, Ch. J., said he was not much disposed to yield to arguments of public policy; that the judges had gone much further than they were warranted in going on such questions; that they had taken on themselves, sometimes, to decide doubtful questions of policy; and they were always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of public policy. Judge Story has said that the Courts have never really defined it. That it varies with the habits

and fashions of the day; with the growth of commerce and the usages of trade.

In the Licence Tax Cases, 5 Wall. U. S. R., 462, Chief Justice Chase said: "This Court can know nothing of public policy except from the constitution and laws, and the course of administration and decision."

Whether purchases and sales of gold unduly affect the currency, and, if so, to what extent; whether the tendency of such transactions is to depress or stimulate values, are questions of political economy that address themselves chiefly to the legislative department. Their solution depends upon the laws and usages of trade and commerce, the course of legislation, the confidence of the people in the circulating medium, and the good faith and stability of the government, the state and condition of the country. There is nothing in this record, this court has no data, no facts before it, which enable it to declare that the business of buying and selling gold injuriously affects the currency, the trade or the morals of the country. We may indulge in speculative opinions upon the subject; but it would be going very far to pronounce such transactions illegal, upon some vague and undefined notion that their tendency is to violate public policy. The case cited, and others that might be referred to justify no such conclusion.

The judgment of the Court below is therefore affirmed.